FILED
FEB 9 1980
MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
P.O. Box 27363
Richmond, Virginia 23261

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401

JACK GREENBERG
JAMES M. NABRIT, III
BARRY L. GOLDSTEIN
NAPOLEON B. WILLIAMS, JR.
Suite 2030
10 Columbus Circle
New York, New York 10019

Counsel for Petitioners

TABLE OF CONTENTS

	Page
CITATION TO OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
QUESTIONS PRESENTED	6
STATEMENT OF THE CASE	7
HOW THE FEDERAL QUESTIONS WERE RAISED BELOW	15
REASONS FOR GRANTING THE WRIT	16
I. THE DISTRICT COURT'S ORDER DENYING THE PARTIES' JOINT MOTION IS APPEALABLE AS A COLLATERAL ORDER UNDER 28 U.S.C. §1291	19
II. THE DISTRICT COURT'S DISAPPROVAL OF THE PROPOSED CONSENT DECREE IS APPEALABLE AS AN INTERLOCUTORY ORDER UNDER 28 U.S.C. §1292 (a)(1)	24
III. RULE 23(e) DOES NOT AUTHORIZE A FEDERAL DISTRICT COURT TO DISAPPROVE A SETTLEMENT MEETING THE REQUIREMENTS OF WEBER ON THE GROUND THAT THE CLASS MEMBERS ARE NOT NECESSARILY VICTIMS OF DISCRIMINATION BY THE DEFENDANTS ...	28
CONCLUSION	33
APPEENDIX	
Opinion of the Court of Appeals	1a
Opinion of the District Court	28a
Judgment of the District Court	51a
Judgment of the Court of Appeals	52a

TABLE OF AUTHORITIES

Page

Cases:

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 18,30

Baltimore Contractors v. Bodinger, 348 U.S. 176 (19) 26

Catlin v. United States, 324 U.S 229 (1945) 19

Cohen v. Beneficial Industrial Loan Corp. 377 U.S. 541 (1949) 17,19,20,24

Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956) 27

Cooper & Lybrand v. Livesay, 437 U.S. 463 (1978) 19,23

Eisen v. Carlisle & Jacquelin, 417 U.S 156 (1974) 19

Flinn v. FMC Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied 424 U.S. 969 (1976) 31

Franks v. Bowman Transportation Co., 424 U.S. 747 (1978) 11,22

In re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973) 16

Gardner v. Westinghouse Broadcasting Co., 437 U.S 478 (1978) 19,25,26

Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1964) 23

Page

Liberty Mutual Ins. Co. v. Wetzel, 424 U.S 737 (1976) 25

Mercantile National Bank at Dallas v. Langdeau, 371 U.S 555 (1963) 23,24

Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912 (1971) 16

Patterson v. Newspaper & Mail Del. U. of N.Y. Vic., 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976) 31

Regents of the University of California v. Bakke, 438 U.S 265 (1978) 18,21

Russell v. American Tobacco Company, 528 F.2d 357 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976) 13

Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956) 27

Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) 16,17

Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966) 25,26

Teamsters v. United States, 431 U.S. 324 (1977) 22,24

United Steelworkers of America, AFL-CIO-CLC v. Weber, ___ U.S. ___ 61 L.Ed. 2d 480 (1979) 7,17,18,20, 21,22,24,27, 28,30,32

Constitutional Provisions

Fifth Amendment to the Constitution of the United States 3,15

Statutes

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 ..... 3,6,8,16, 17,18,19

28 U.S.C. §1292(a)(1) 3,6,8,16, 17,18,24, 25,26

42 U.S.C §1981 6,7

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. 3-5,7,15,17, 18,22,24,27, 28,30

Rules

Rule 23(e), Federal Rules of Civil Procedure 6,7,13,15, 28

Legislative History

Remarks of Senator Hubert Hemphrey, 110 Cong. Rec., 6548, concerning Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. 30

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

==========

FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE
AMERICAN TOBACCO COMPANY; LOCAL 182,
TOBACCO WORKERS INTERNATIONAL,
TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

==========

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

==========

Frank L. Carson, Lawrence Hatcher, and Stuart E. Mines, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered on September 14, 1979, dismissing an appeal by petitioners from an order, entered June 2, 1977, by the

United States District Court for the Eastern District of Virginia, Richmond Division, denying a joint motion by the parties to approve and enter a consent decree.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 606 F.2d 420 and is set forth in the Appendix. The opinion of the District Court is reported at 446 F.Supp. 790 and is set out in the Appendix.

JURISDICTION

The judgment of the Court of Appeals dismissing the appeal was entered on September 14, 1979. See Appendix. Following this dismissal, petitioners filed a motion with this Court for an extension of time in which to file a petition for a writ of certiorari. On December 6, 1979, the Court granted the motion and ordered the time for petitioners to file a writ of certiorari extended until, and including, February 11, 1980.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States.

This case also involves the following federal statutes:

a. 28 U.S.C. §1291

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

b. 28 U.S.C. §1292(a)

> The court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

c. 42 U.S.C. §2000e-2

> (a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities

or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

....

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

d. Rule 23(e), Federal Rules of Civil Procedure

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that petitioners were not entitled under 28 U.S.C. §§1291 and 1292(a)(1) to appeal a denial by the district court of a joint motion by the parties to approve and enter a proposed consent decree enjoining defendants from engaging in unlawful discriminatory actions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, et seq., and 42 U.S.C §1981?

2. Whether the federal district court below erred in holding that the due process clause of the Fifth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, prohibit federal courts from judicially approving, in the absence of discrimination by defendants against plaintiffs and other class members, proposed consent decrees providing for

remedial use of race-conscious affirmative action program in accordance with requirements set forth in United Steelworkers of America, AFL-CIO-CLC v. Weber, ___U.S. ___, 61 L.Ed. 2d 480 (1979)?

3. Whether the district court below applied proper criteria, or otherwise abused its discretion, under Federal Rules of Civil Procedure 23(e) in refusing to approve a proposed settlement by the parties of a Title VII class action?

STATEMENT OF THE CASE

General. On October 24, 1975, petitioners, present and former seasonal employees at the Richmond Leaf Department of the American Tobacco Company, a subsidiary of American Brands, Inc., which is located in Richmond, Virginia, filed a complaint on behalf of themselves and other black employees at the Richmond Leaf Department. The complaint charged that defendant American Brands, Inc., defendant Tobacco Workers' International Union, and defendant Local 182 of the Tobacco Workers' International Union, in violation of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and 42 U.S.C §1981, discriminatorily denied black workers hiring, promotion, and transfer opportunities and discriminatorily restricted

black workers to low paying and otherwise undesirable jobs.

After the conduct of extensive discovery, the district court, on March 1, 1977, certified a class consisting of (1) black persons, currently and formerly employed who were seasonal employees of the American Tobacco Company's Richmond Leaf Department on or after September 9, 1972, and (2) black persons who applied for seasonal employment at the American Tobacco Company's Richmond Leaf Plant on or after September 9, 1972.

The parties reached a settlement of plaintiffs' claims, entered into a proposed consent decree, and jointly moved for approval and entry of the proposed decree. The district court denied the motion on June 1, 1977.

On May 14, 1979, the United States Court of Appeals for the Fourth Circuit ordered the merits of the appeal to be determined en banc. On September 14, 1979, however, the Court of Appeals ordered the appeal dismissed on the ground that the order appealed from below was not appealable within the intendment of 28 U.S.C. §§1291 and 1292. Chief judge Haynsworth and circuit judges Winter and Butzner dissented in an opinion holding that the order was appealable and that the consent decree should have been approved.

History of Racial Discrimination. American Brands, Inc., employs 150 seasonal employees and 100 regular, or full-time, employees to process and store leaf tobacco at the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia. The seasonal employees, all of whom are black, work between six and nine months during the year. By contrast, regular employees, of whom 34% are white, work throughout the year.[1/] Both the seasonal and regular employees are represented by defendant Local 182, Tobacco Workers' International Union (herinafter "T.W.I.U.").

Prior to September 16, 1963, union jurisdiction over job positions at the Richmond Leaf Department was divided betweeen Local 182 of the T.W.I.U. and Local 214 of the T.W.I.U. The former, whose membership was then all white, had exclusive jurisdiction over regular job classifications. Local 214's membership was limited

---

1/ The following table represents the racial composition of the employees at the Richmond Leaf Department from 1968-1976:

Year	Regular Employeed		Seasonal Employees	
	Whites	Blacks	Whites	Blacks
1968	41	52	0	116
1970	40	59	0	175
1973	40	56	0	176
1976	37	57	0	135

to black employees who were seasonal workers at the Richmond Leaf Department.

While the existence of two separate unions at the Department was officially terminated on September 16, 1963, the pre-existing patterns of racial discrimination, however, continued in effect at the Richmond Leaf Department as a consequence of regulations and procedures establishing the system of seniority and transfer rights of employees.

Seniority and Transfer Rights. Prior to September 16, 1963, permanent job vacancies were filled by canvassing the employees within the bargaining unit of the union having jurisdiction of the jobs in which the vacancies existed. This procedure benefitted the white members of Local 182 in the competition for permanent job positions.

Following the 1963 merger of the Locals, the rules governing the filling of vacancies in the full-time positions continued to exclude or disadvantage the black workers who had been discriminatorily assigned to seasonal positions. When management requests a job transfer of a regular employee that employee does not lose seniority rights, but when management requests a seasonal employee to transfer to full-time work

that employee loses his seniority rights. Moreover, when a regular worker transfers from one full-time job to another one the employee retains all of his seniority rights, but when a seasonal worker transfers to a full-time job he loses all of his seniority rights.[2/] Furthermore, a seasonal worker who transfers to a full-time position almost always must enter at a bottom-level position because the regular workers have the first opportunity to move to the vacancies in full-time positions; accordingly, if a seasonal worker is employed in a seasonal position above the entry-level, he frequently will be required to suffer a short-term pay cut in order to move into a full-time position. The imposition of these penalties, the loss of seniority and the possible reduction in short-term pay, serve to lock in the effects of the historical discriminatory practices which existed at the Richmond Leaf Division. For example, as of February 13, 1976 only one of the 16 positions of watchman was held by a black employee.

2/ The transferring seasonal worker loses not only his "competitive" seniority rights, e.g., rights for job security and promotion, but also his "benefit" seniority rights, e.g., right for sick leave and vacation, except for retirement benefits. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747, 765 (1976).

The historical practices of discrimination have continued to limit the employment opportunities of black workers for supervisory as well as hourly jobs. Almost invarably the Company selects its supervisory employees from its full-time staff. The Company has never promoted a seasonal worker directly to a supervisory position. The continuation of the effects of the past segregative practices has resulted in the selection of a disproportionately small group of the Company's black employees as supervisors. As of April, 1976, only 20% of these positions were filled by blacks.

Proposed Consent Decree. Discovery conducted by the parties following the commencement of this lawsuit showed dramatically the degree to which particular job classifications could be identified by race. It also showed the extent to which seniority rules and transfer rules impinged on the capacity of defendants to eradicate the vestiges of past racial discrimination. The parties, of course, had differing views on the extent to which such lingering effects exist. To resolve their disagreement and to settle the controversy, the parties negotiated a proposed consent decree settling all claims outstanding between them and presented it to the district

court, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure.

One of the principal features of the proposed consent decree was a seniority clause requiring current and future employees to be credited with actual time worked at the plant as seasonal employees. Another feature of the proposed consent decree allowed seasonal employees to transfer to permanent job positions as vacancies occurred provided, of course, no regular employees desired the positions. These provisions were patterned after the relief fashioned for seasonal workers in Russell v. American Tobacco Company, supra, 528 F.2d 357, 362-64 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Under the first above-mentioned feature of the proposed consent decree, seasonal workers are allowed to maintain their seniority upon transfer to regular positions. Under the second feature, seasonal employees are permitted to bid on vacancies in classifications, such as watchmen, which were once reserved for whites.

In addition, the proposed consent decree contained, in Part III, section 5, an affirmative action provision to reduce a historical underrepresentation of blacks which had existed in the

supervisory positions. This provision provided that:

> The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

Furthermore, the consent decree eliminated the requirement that seasonal workers must serve a probationary period when they transfer to a full-time position. Finally, the decree contained a general injunction prohibiting the defendants from discriminating against black workers and a reporting provision requiring the Company to submit for a three-year period specific reports detailing compliance with the Decree.

All of the parties found that these provisions represented, in light of the history of the Richmond Leaf Department, a settlement that was reasonable, just, and fair to all concerned. Despite their agreement, the district court, by order filed June 2, 1977, denied the joint motion of the parties to approve and enter the proposed consent decree.

HOW THE FEDERAL QUESTIONS WERE RAISED BELOW

A joint motion was made by the parties to the district court to approve and enter, pursuant to the requirements of Rule 23(e) of the Federal Rules of Civil Procedure, the proposed consent decree. The motion was denied. The district court offered several reasons in support of its refusal to grant the motion. First, the court stated that Title VII of the Civil Rights Act and the due process clause of the Fifth Amendment to the Constitution prohibited the court and the defendant employers and unions from awarding preferential treatment to employees based upon race except upon a showing of past or present discrimination. Second, the court said the proposed consent decree was fatally flawed in seeking to provide preferential treatment for black employees who were not shown to have been victims of discrimination. The court stated that the absence of discrimination was established by the fact that the proposed consent decree contained a provision in which the defendants denied that their actions had been discriminatory.

The issue of the appealability of the district court's order was raised when, upon appeal, the Court of Appeals for the Fourth Circuit

dismissed the appeal on the ground that the order was nonappealable under 28 U.S.C. §§1291 and 1292 (a)(1).

REASONS FOR GRANTING THE WRIT

The petition should be granted because of a conflict between the circuits. The importance and complexity of the issues are demonstrated by the convening of an en banc court and by the fact that the other two Circuit Courts of Appeals which have explicitly considered the issues have rendered conflicting decisions. The Fourth Circuit specifically noted that its decision was in accord with that of the Second Circuit in Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) and contrary to the decision of the Ninth Circuit in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912 (1971). The Fourth Circuit's decision also conflicts with the decision of the Eighth Circuit in Re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973). The Second Circuit in Seigal v. Merrick, supra, like the Fourth Circuit, explicitly stated that its decision there was in conflict with Norman v. McKee, supra.

Circuit Judges, Winter, Butzner, and Chief Judge Haynsworth dissented below, holding that the

order was appealable under §1292(a)(1) as an interlocutory order refusing an injunction.

The petition should also be granted because of the importance of the issues raised. Two of the issues concern appealability of orders under the federal appeals statutes. The third, and final, issue concerns the ability of litigants to settle Title VII class actions, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, in accordance with criteria set forth by this Court in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

The first issue on appealability is whether a district court's refusal to approve a proposed consent decree is appealable, notwithstanding the "finality" requirement of 28 U.S.C. §1291, under the "collateral order" doctrine described in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[3/] The second issue raised in this petition is whether such an order is appealable under 28 U.S.C. §1292(a)(1) if the proposed consent decree includes, as here, a request for injunctive relief and if the court's disapproval of the decree is based upon its determination that approval is prohibited by federal law. The

---

3/ On this issue, the decision in Norman v. McKee, supra, is in conflict with the decision in Seigal v. Merrick, supra, and with the decision by the Court of Appeals below.

answers to these questions turn upon the proper interpretation and application of 28 U.S.C. §§1291 and 1292 (a)(1). This Court's response to these issues will be of crucial importance to the ability of litigants to settle actions and the effectuation of Congressional and judicial policies favoring settlement of actions by litigants themselves. Accord: Alexander v. Gardner-Denver Co., 415 U.S 36, 44 (1974); Regents of the University of California v. Bakke, 438 U.S 265, 364-65 (1978) (Opinion of Justices Bennan, White, Marshall, and Blackmun).

The Court's resolution of the third issue will decide whether the decision in Weber, supra, can be used by litigants in pending actions as a basis for settlement of private Title VII actions. In particular, it will resolve the question of whether a district court can seize upon the parties' inclusion, in a proposed consent order, of an exculpatory clause, whereby defendant is permitted to deny any discrimination against plaintiff, as a basis for denying approval of a consent decree which is in strict compliance with Weber.

I.

THE DISTRICT COURT'S ORDER DENYING THE PARTIES' JOINT MOTION IS APPEALABLE AS A COLLATERAL ORDER UNDER 28 U.S.C. §1291.

Petitioners agree that the policy of 28 U.S.C. §1291 disfavoring appeals from nonfinal orders is salutary and must be respected. Cooper & Lybrand v. Livesay, 437 U.S 463, 471 (1978); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478, 480 (1978). Judicial orders which do not result in a judgment terminating the entire action are generally not final judgments within the intendment of §1291. Catlin v. United States, 324 U.S. 229 (1945). The purpose of the finality requirement is to prevent the debilitation of judicial administration caused by piecemeal reviews of a single controversy. Eisen v. Carlisle & Jacquelin, 417 U.S 156, 170 (1974). Catlin v. United States, 324 U.S. at 233. See Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546. This policy, however, is not frustrated by permitting appeals on certain collateral orders that cannot be reviewed effectively on appeal from a final judgment. Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546.

To insure that courts do not use this exception permitting appeals of collateral orders to defeat the obvious intent of the statute, this Court has held that the exception is only applicable to the small class of orders which

> finally determine claims of right separable from and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be defined until the whole case is adjudicated.

Cohen, supra, 337 U.S. at 546.

The collateral order doctrine is applicable if (1) the merits of the collateral order are separate and independent from the merits of the action itself, (2) the collateral order has finally determined the "collateral" rights, (3) serious and irreparable injury has been caused by the collateral order, and (4) the collateral order cannot be effectively reviewed on appeal.

The order of the district court below satisfies each of these four criteria. The district court's order denying approval of the proposed consent decree determined conclusively and finally for the parties herein whether an affirmative action plan satisfying the requirements of Weber can be used as the basis for settling the litigation. In Weber, this Court upheld the validity of an affirmative action plan providing remedial relief to minorities who worked in occupations which had traditionally been closed to them. This Court noted that the plan approved in Weber between the United Steelworkers of America and Kaiser Aluminum & Chemical Corp., like the one here, did not require the discharge of white

workers or otherwise unnecessarily trammel upon the interests of white employees. Moreover, the plan, again like here, was voluntary and designed to break down traditional patterns of racial segregation and hierarchy. Additionally, the plan in Weber, like the plan here, did not create an absolute bar to the advancement of white employees. It was temporary and was created to eliminate a manifest racial balance and not to maintain racial balance. Finally, both the plan in Weber and the plan envisioned by the consent decree did not require a percentage of black employees greater than that of blacks in the labor force.

In approving the validity of the Kaiser plan, this Court held that the validity of the plan was independent of whether Kaiser or United Steelworkers had discriminated against blacks and was independent of whether any of the black employees who were to benefit from the plan were themselves victims of discrimination by either Kaiser or United Steelworkers.[4/] The proposed consent decree rejected by the district court below had an affirmative action component exactly like

---

4/ To this extent the decision in Weber tracks the decision in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) where the Court approved the limited use of race-conscious plans without restricting their use to victims of discrimination by the originators of the plans.

the plan in Weber. Moreover, the sole basis for the district court's rejection of the proposed decree was the inclusion of an affirmative action plan in the absence of proof of discrimination by defendants against plaintiffs and the class members.

Thus, in rejecting the decree, the district court made a final determination of the parties' right to settle the action with a judicial decree incorporating a program of affirmative action based upon Weber. The opinion of the district court that a legal impediment existed to approval of the consent decree was a final determination which was not conditioned upon any further action being taken by one or both of the parties. The issues thereby decided by the district court were separate and independent of the issues raised in the Title VII action since, in order to prevail in that action, the petitioners must show that they and the members of the class are victims of discrimination by defendants. See Franks v. Bowman Transportation Co., 424 U.S. 747 (1976); Teamsters v. United States, 431 U.S. 324 (1977).

Moreover, the order of the district court below cannot be effectively reviewed upon appeal from a final judgment in this case since such a judgment would merely confirm that the petitioners had lost the very right which they were seeking to

protect, namely the right to settle the action without going to trial. The order will unquestionably cause irreparable injury to petitoners and respondents since it requires them to conduct an unnecessary, expensive, and time-consuming trial.

Sanctioning an appeal in this case is not inconsistent with the decision in Cooper and Lybrand v. Livesay, 437 U.S 463 (1978), where the Court, in not permitting an appeal of a district court's denial of a class certification order, warned against appellate courts indiscriminately thrusting themselves into the trial process. 437 U.S at 476. What is at issue here is the validity of a rule of law promulgated by the district court which asserts that the principles enunciated in Weber cannot lawfully be incorporated into a class action settlement. It is not an indiscriminate intrusion into the trial process to say that the order embodying this rule of law is reviewable upon appeal.

The considerations favoring appealability in this case parallel those in Gillespie v. U.S. Steel Corp., 379 U.S 148 (1964), where the Court allowed an appeal from a ruling of the district court striking various allegations of the complaint permitting recovery, and in Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555

(1963), where an appeal was permitted of an order by the Texas Supreme Court rejecting the defendant's venue objections. These cases recognized that a collateral order is appealable when the merits of the collateral controversy are separate and apart from the merits of the main action.[5/] In light of this Court's decision in United States Steelworkers of America, AFL-CIO-CLC v. Weber, supra, the district court's order disapproving the proposed consent decree does not involve the important factual and legal issues raised in the Title VII action. See Teamsters v. United States, supra.

II.

THE DISTRICT COURT'S DISAPPROVAL OF THE PROPOSED CONSENT DECREE IS APPEALABLE AS AN INTERLOCUTORY ORDER UNDER 28 U.S.C. §1292 (a)(1).

Read literally, §1292(a)(1), providing for appeals of interlocutory orders of district courts granting or refusing injunctions, is clearly applicable to the order of the district court below. It was so held by the dissenting judges

---

5/ Application of Cohen requires that the merits of the collateral order not be "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Mercantile Nat. Bank v. Langdeau, supra, 371 U.S at 558.

below. They held that the order of the district judge was an interlocutory order refusing an injunction. The contrary decision of the majority was based upon their belief that decisions of this Court have put a gloss on the plain meaning of the statute. See Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966); Liberty Mutual Ins. Co. v. Wetzel, 424 U.S 737 (1976); Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978).

The majority of the Court of Appeals held that these decisions limit the application of §1292(a)(1) to orders that are "interlocutory" in a special sense of the meaning of the term interlocutory. Cases such as Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra (disallowing an appeal of an order denying a motion for summary judgment requesting injunctive relief) and Liberty Mutual Ins. Co. v. Wetzel, supra (denying appeal of a judgment fixing liability while postponing determination on a request for permanent injunctive relief) were cited as authority for this proposition.

Petitioners contend that this Court's decisions have set forth the following criteria for application of §1292(a)(1). First, the order must be preliminary, i.e., one that is made before trial and is unconditional. Switzerland Cheese

Association v. E. Horne's Market, Inc., supra, 385 U.S at 25. Second, the order must do more than merely direct the case to proceed to trial. Id., 385 U.S. at 25. Also, Baltimore Contractors, Inc. v. Bodinger, 348 U.S 176 (1955) (an order refusing to stay referral of an issue from arbitration is not appealable under §1292(a)(1)).

Third, the order must settle, either tentatively or finally, some aspects of the merits of the claims. Switzerland Cheese Association v. E. Horne's Market, Inc., supra, 385 U.S at 25; Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 481-82. Fourth, the order must "pass on the legal sufficiency of the claim for injunctive relief." Gardner, supra, 437 U.S. at 481. Fifth, the order must have an "irreparable" effect. Id., 437 U.S. at 480. Finally, the order must not be one which can be reviewed "both prior to and after final judgment." Id.

Whether these six criteria are the proper ones for determining the appealability of an interlocutory decree under §1292(a)(1) and whether an order refusing approval of a proposed consent order encompassing a request for injunctive relief statisfies these criteria are important issues affecting successful administration of §1292(a)(1).

Petitioners contend that each of these six criteria is satisfied by the district court's decree disapproving the proposed consent decree. There is no doubt that the decree herein was preliminary, unconditional, and that it decided something other than that the parties must go to trial. The order effectively decided that an affrimative action plan identical to that in Weber could not be used, absent proof of discrimination, as a basis for settlement of a Title VII action. Thus, the order had the legal effect of precluding defendants from withdrawing their defense of prior discrimination, or from admitting the occurrence of such discrimination, and continuing the litigation on that basis. In this light, the order of the district court, when considered from the perspective of its legal impact on defendants' ability to modify or withdraw their defense, is analogous to the situations in Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956)(appeal is allowable from order dismissing two of plaintiff's claims) and in Cold Metal Process Co. v. United Eng'r & Foundry Co., 351 U.S. 445 (1956) (appeal allowed of order dismissing counterclaim where it was based on transactions similar to those in plaintiff's claims).

The order disapproving the consent decree touched on the merits of plaintiffs' claims in a unique and significant way. It preliminarily resolved the issue of the legal sufficiency of the Title VII claims by holding that the history of defendants' employment practices and policies did not disclose an adequate legal basis for concluding that defendants had ever discriminated against blacks. Although this aspect of the order might conceivably be reviewable upon appeal from a final judgment, that aspect of the judgment which deprived the parties of the opportunity to fashion a settlement in accordance with Weber cannot be so reviewed. Finally, the order had an irreparable effect on the parties by forcing them to undergo an expensive, unwanted, and unwarranted, trial.

III

RULE 23(e) DOES NOT AUTHORIZE A FEDERAL DISTRICT COURT TO DISAPPROVE A SETTLEMENT MEETING THE REQUIREMENTS OF WEBER ON THE GROUND THAT THE CLASS MEMBERS ARE NOT NECESSARILY VICTIMS OF DISCRIMINATION BY THE DEFENDANTS

The parties' evaluation of discovery data and their assessement of the merits, established a basis for settlement of the action on terms reasonable and fair. The negotiations for the settlement were complex and difficult. For

two months, from February 1977 to March 1977, counsel labored at trying to find terms which were acceptable to all affected. In the proposed decree, each party stated that it was not admitting that it previously stated position was wrong.[6/] Based upon the data disclosed through discovery, reasonable settlement required the correction of the vestiges of earlier discrimination. The proposed consent decree purported to do this by undoing the effects of the discriminatory practices. Defendants were specifically enjoined to take action which had the effect of reversing the discriminatory rules.

6/ Thus, the final draft of the agreement provided that

> Defendants expressly deny any violation of the Fourteenth Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended, or any other equal employment law, regulation or order. This Decree and Consent hereto does not constitute a finding or admission of any unlawful or discrimintory conduct by defendants.
>
> Plaintiffs' consent to this Decree does not constitute a finding or admission that any of the employment practices of the Richmond Leaf Department of the American Tobacco Company, a division of American Brands, Inc., are unlawful.

The action of the district court in rejecting for the reasons which it did the parties' joint motion for approval of the proposed consent decree has seriously undermined this Court's decision in United Steelworkers of America v. Weber, supra, as well as undermined the successful implementation of Congressional policies favoring voluntary settlement of discrimination cases. See Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44. In its recent decision in Weber, this Court took great pains to emphasize to private parties covered by Title VII that they could, without fear of being held in violation of Title VII, voluntarily negotiate and implement race-conscious, remedial plans whenever those plans were properly designed so that they did no more than carry out the essential purposes of Title VII.

Those purposes are basically as follows: (1) to break down old patterns of racial hierarchy; (2) to "open employment opportunities for Negroes in occupations which have been traditionally closed to them," Remarks of Senator Hubert Humphrey, 110 Cong. Rec. 6548; (3) to eliminate instances of manifest racial balance; and (4) to prohibit undue efforts to maintain racial balances. This Court held in Weber that affirmative action plans effectuating these purposes were

lawful as long as they did not unnecessarily trammel upon the interests of white employees by requiring their discharge or by creating an absolute bar to their advancement or by permitting a greater percentage of minority employees to be benefitted under the plan than which exists in the local labor force. Such plans were also required to be temporary since otherwise they would foreseeably operate to maintain an improper racial balance.

Although a decision on the correctness of the district court's disapproval of the proposed consent decree necessarily raises the general issue of what criteria are to govern an exercise of the district court's power to accept or reject settlements under Rule 23(e), see Flinn v. FMC Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 969 (1976); Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S 911 (1976), the only specific issue which must be determined here is the power of the district court to disapprove a proposed consent order merely because it provides for an affirmative action plan based on principles approved in Weber and instituted on behalf of minority employees who

have not been shown to be victims of discrimination by defendants.

Put another way, the precise question which has to be decided is whether Rule 23(e) can be utilized by a district court to effectively "overrule" this Court's decision in Weber and to frustrate federal policies favoring voluntary settlement of legal disputes. Subsumed under this question is the question of whether the district court, under the guise of exercising its discretion under Rule 23(e), can determine, as it did, that, as a matter of federal law, the implementation of a remedial scheme of preferential employment for minorities based upon principles set forth in Weber infringe thereby, in the absence of proof of discrimination by defendants against minority employees, upon the constitutional rights and statutory rights of white employees. Petitioners contend that such an action by a district court is an abuse of power under Rule 23(e) which requires immediate correction.

C O N C L U S I O N

For the reasons set forth herein, petitioners request that their petition be granted.

Respectfully submitted,

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
P.O. Box 27363
Richmond, Virginia 23261

JOHN W. SCOTT, JR.
615 Caroline Sreet
Fredericksburg, Virginia 22401

JACK GREENBERG
JAMES M. NABRIT, III
BARRY L. GOLDSTEIN
NAPOLEON B. WILLIAMS, JR.
Suite 2030
10 Columbus Circle
New York, New York 10019

COUNSEL FOR PETITIONERS

APPENDIX

Decisions of the Courts Below

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2260

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Appellants,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Appellees.

Appeal from the United States District Court
For the District of Richmond, Virginia

Decided En Banc September 14, 1979

Reported at 606 F.2d 420

Before

HAYNSWORTH, *Chief Judge,*
and WINTER, BUTZNER, RUSSELL, WIDENER,
HALL and PHILLIPS, *Circuit Judges.*

K. K. HALL, *Circuit Judge:*

Plaintiffs seek an interlocutory appeal under 28 U.S.C. § 1292(a)(1) of the district court's refusal to enter a consent decree agreed to by the named parties in a Title VII class action.

The suit is based on claims of race discrimination and is brought against employer and union on behalf of black workers and black applicants for employment at an American Tobacco Company plant in Richmond, Virginia. The decree would grant money damages and hiring and seniority preferences to black employees and would set a goal requiring the employer to give preference to blacks in hiring for supervisory positions until a certain number of qualified blacks were employed. The decree was negotiated by representative plaintiffs, and it provides for notice to all class members.

The named plaintiffs contend that this relief is injunctive in nature, and, because the district court refused to enter the decree, its order is immediately appealable under § 1292(a)(1) as a denial of injunctive relief. We disagree.

The district court's order refusing entry of the decree does not deny any relief, whatever its nature. It merely requires the parties to either revise the decree or proceed with the case by trial or motions for summary judgment. The immediate consequence of the order is continuation of the litigation and, because the merits of the decree can be reviewed following final judgment, we think it is not an appealable order under § 1292(a)(1). Accordingly, we dismiss the appeal.

I.

In *Flinn* v. *FMC Corporation*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976), we heard the appeal of individual class plaintiffs alleging that the district court abused its discretion by entry of a consent decree in a Title VII sex discrimination class action. There, the overwhelming majority of class members had voted to adopt the decree, and the dis-

trict court entered it on the "eve of trial." With scholarly care, Judge Russell surveyed various interests supporting entry of the decree and posited the rule that, when a district court is presented with a consent decree, it should view the merits of the decree in light favorable to its entry. That is, it should, without requiring technical perfection or legal certitude, determine whether the law and the facts of record *arguably* support its terms. Under this standard, he identified factors which the district court should consider in exercising its discretion. These included "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement, and the experience of counsel who may have represented plaintiffs in the negotiation." *Id.* at 1173.

Plaintiffs argue that the district court erred in failing to consider the proposed decree under the liberal standards of *Flinn*[1] and that its refusal to enter the decree is immediately appealable. Although we think the district court should have reviewed the proposed decree under *Flinn*, we do not think its refusal to approve the decree is a matter properly within our jurisdiction prior to final judgment.

In *Flinn*, the district court's *entry* of the decree terminated the action, whereas here the district court's order refusing it has no such effect—it continues the proceedings, making our review of it an interlocutory appeal.

II.

As a general rule appeals of right from interlocutory trial court decisions are not favored. 28 U.S.C. § 1291.

---

[1] Counsel in this case failed to cite *Flinn* to the district court in their three separate memoranda of law filed in support of the proposed decree and failed to move the court following its order to reconsider in light of that case. Instead, they immediately brought this appeal.

Baltimore Contractors, Inc. v. *Bodinger,* 348 U.S. 176, 75 S.Ct. 249, 99 L.Ed. 233 (1955); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 98 S.Ct. 2454, 2459, 57 L.Ed.2d 351 (1978); *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 98 S.Ct. 2451, 2453, 57 L.Ed.2d 364 (1978). They disrupt the trial process, slow the course of litigation and create unnecessary multiple appeals. A single appeal following final judgment facilitates orderly litigation and comprehensive appellate review of all issues presented, many of which are dependent upon or related to other issues in the suit. After final judgment, the fact issues have been settled in the appropriate forum, and appellate review can be dispositive of all issues in the case. *See, Coopers & Lybrand* v. *Livesay,* 98 S.Ct. at 2460-61.

In the interests of justice, appeals of right from interlocutory orders are allowed when the delay in hearing an appeal after final judgment poses some irreparable consequence, *Gardner* v. *Westinghouse Broadcasting Co.,* 98 S.Ct. at 2453, or when the issue to be determined is sufficiently collateral to the ongoing litigation that no disruption of the trial process will attend early appellate review, *see Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546-47, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Coopers & Lybrand* v. *Livesay,* 98 S.Ct. at 2459.

Special statutory exceptions to the final judgment rule are set forth in 28 U.S.C. § 1292(a). Plaintiffs argue that characterization of the refused relief as "injunctive" is sufficient to meet the plain terms of § 1292(a)(1), which reads in pertinent part,

> The court of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the [district courts] granting, continuing, modifying, refusing or dissolving

injunctions, or refusing to dissolve or modify injunctions. . . .

But a mere labeling of relief is not sufficient. *See City of Morgantown, W. Va.* v. *Royal Ins. Co.*, 337 U.S. 254, 258, 69 S.Ct. 1067, 93 L.Ed. 1347 (1949). Courts look to the consequence of postponing appellate review following final judgment and weigh the need for immediate appeal against the important judicial interests militating against piecemeal review. *See Gardner* v. *Westinghouse Broadcasting Co.*, 98 S.Ct. at 2454; *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2460. This test is applied to appeals in class actions as well as to those in ordinary litigation.[2] Under this test, we find no appeal of right from orders refusing consent decrees at any time before final judgment.

III.

The consequence of the district court's order is not irreparable. No right is forfeited as a result of delayed review. Here, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings. *See Liberty Mutual Insurance Company* v. *Wetzel*, 424 U.S. 737, 744-45, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). Like the denial of a motion for summary judgment which, if granted, would include injunctive relief, the denial of this consent decree decided "only one thing—that the case should go to

---

[2] As the Court noted in *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2459:

> There are special rules relating to class actions and, to that extent, they are a special kind of litigation. Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation.

trial." *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25, 87 S.Ct. 193, 195, 17 L.Ed.2d 23 (1966).

In *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), the Supreme Court held that the pretrial denial of class certification in a Title VII case was not appealable under § 1292(a)(1) as a denial of injunctive relief. In that case, which involved allegations of sex-based discrimination, the complainant sought broad injunctive relief for the class similar to the relief proposed in the decree before us. The Court reasoned that the pretrial order denying class certification was not one of irreparable consequence since it could be reviewed at any stage of the proceedings either before or after final judgment, did not affect the complainant's personal claim for injunctive relief, and did not pass on the legal sufficiency of any claim for injunctive relief. *Id.* 98 S.Ct. at 2453-54 and notes 7, 8 and 9 (citing *Switzerland Cheese*).

IV.

The analogous consequences of a district court's disapproval of a settlement in a class action and its refusal to grant summary judgment were considered by the Second Circuit in *Seigal* v. *Merrick*, 590 F.2d 35 (2nd Cir. 1978). The issue there was whether, in a stockbroker derivative action, the court's order refusing settlement was appealable before final judgment.

Relying upon the analysis in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978), a case decided the same day as *Gardner*, the *Seigal* court discussed the judicial and private interests always present where the rights of represented and unrepresented individuals may be compromised by the court's approval of a

settlement. The court explained the purpose of requiring class action settlements to be presented to district courts under Fed.R. Civ.Proc. 23.1.

> [A]n order disapproving a settlement . . . is based, in part, upon an assessment of the merit of the positions of the respective parties, and permits the parties to proceed with the litigation or to propose a different settlement.
>
> A settlement in an ordinary civil litigation is normally the sole concern of the parties. In stockholder derivative actions, on the other hand, because of the vicarious representation involved, the court has a duty to perform before an action can be "settled." . . . This approval cannot be a rubber stamp adoption of what the parties alone agree is fair and equitable.

Seigal v. *Merrick,* 590 F.2d at 37-38. The court pointed out that disallowing appeals of right from each refusal to enter a settlement had the practical effect of enhancing the district court's control over the litigation.

> [T]he denial of one compromise does not necessarily mean that a "sweetened" compromise may not be approved. The management of a derivative suit gives the trial judge a chance not only to disapprove a compromise but to edge the parties toward more equitable terms.

Id. at 39.

The *Seigal* court reasoned that a rule allowing appeals of right from orders refusing entry of settlements was unjustified. It would interrupt the litigation and thrust appellate courts indiscriminately into the trial process with-

out appreciable benefit to class members whose interests were to be protected.

Therefore, the court concluded that such an order was not appealable before final judgment. *See,* Note, *"Recent Developments: Appealability of District Court Orders Disapproving Proposed Settlements in Shareholders Derivative Suits,"* 32 Vand. L.R. 985, 998-1001 (1979). *Contra, Norman* v. *McKee,* 431 F.2d 769, 772-74 (9th Cir. 1970) *cert. denied, ISI* v. *Meyers,* 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971).

V.

We think this Title VII interlocutory appeal should be dismissed. Our review of this pretrial order has halted the litigation for over two years pending review of the district court's exercise of discretion. Given this disruption and the difficult burden on appeal of demonstrating an abuse of discretion, plaintiffs have identified no consequence requiring appellate review before final judgment. We perceive none. Instead, we think our review is best left to follow final judgment.

Under the *Flinn* analysis, the named parties may present a proposed decree to the district court in any form and at any stage in the proceedings. If one decree is refused another may be proposed. At any time the district court can reconsider its refusal to enter a decree. *See Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U.S. at 547, 69 S.Ct. 1221.

When a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record. If the district court refuses a decree because

it is presented too early in the litigation, it may be later approved, perhaps following a decisive vote by class members. Whatever the district court's reasons for refusing a decree, appeals of right from those refusals would encourage an endless string of appeals and destroy the district court's supervision of the action as contemplated by Fed.R. Civ.Proc. 23(e).

A rule allowing review after final judgment, on the other hand, facilitates the district court's supervision of the litigation and enhances appellate review. The district court's consideration and reconsideration of various proposed decrees—in whatever form and whenever presented during the litigation—can be reviewed effectively after final judgment. A single appellate review of all alternative proposals would be dispositive of the *Flinn* issue.[3] Also, after final judgment, important legal questions would rest on a firm factual setting with the parties arguing the importance of the law and facts as they appeared when the decree was proposed. Where alternative or revised decrees have been presented, the parties could advocate on appeal the alternative most favorable to their positions in light of the law and facts appearing when it was presented.. Such argument is vital when appellate courts must authoritatively opine about important unsettled legal issues of the highest social concern in the amorphous context of reviewing a trial

[3] For all our consideration of the merits of this decree, if we allowed the appeal our decision would not be dispositive. *See Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2460-61; *Seigal* v. *Merrick*, 590 F.2d at 39. The ultimate composition of the decree would remain an open matter pending response by individual class members to the class notice. Although the named parties are bound to the terms of the decree as proposed, in fairness to class members, we think our approval of it would have to be conditioned upon acceptance of its terms by at least a majority of the members.

court's exercise of discretion.[4] In all, we think the admonition of Judge Clark is apt,

> A district judge's orders advancing a case to trial ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication. * * * I believe this an intolerable burden for us, an improper and uncertain interference with trial court discretion, and a confusing invitation to indiscriminate appeals in the future—all contrary to settled federal law against piecemeal appeals.

Peter Pan Fabrics, Inc. v. *Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2nd Cir. 1960). (Judge Clark dissenting).

VI.

In conclusion, the district court's discretionary decision to send the parties to trial, in lieu of granting immediate injunctive relief before the facts are settled, is not a ruling of irreparable consequence. Plaintiffs may proceed to trial with no loss of either their claims for final injunctive relief or their right of appellate review of the *Flinn* issue. Short of going to trial, the parties may propose alternative decrees to the district court, one of which may be entered. Appellate review of the order is best effected following final judgment. Such review preserves the trial court's exclusive control over the progress of the litigation and facilitates its supervision of the class action.

---

[4] As noted by the Supreme Court in *Coopers & Lybrand* v. *Livesay*, 98 S.Ct. at 2461, Congress wisely provided in § 1292(b) for appellate review of important legal issues before final judgment only as a matter of discretion by the courts involved. Such review is allowed with approval of both the district court and the court of appeals.

Therefore, we hold that the district court's order refusing entry of the proposed consent decree is not appealable, and, accordingly, the appeal is dismissed.

Appeal Dismissed.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, and BUTZNER, Circuit Judge, join, dissenting:

In this Title VII class action, the district court declined to approve and to enter a consent decree which the parties had negotiated in settlement of the action. Plaintiffs appeal. Unlike the majority, we think that the order denying approval of the settlement and declining to enter it was appealable. As to the merits, we conclude that in the main the district court abused its discretion in declining to approve and enter the decree. We would require that such approval be given, although we would authorize the district court to require a modification of the decree with respect to the notice to be given certain members of the subclass whose alleged rights are to be abandoned as part of the settlement.

We therefore respectfully dissent.

I.

This Title VII class action was brought against the employer, American Brands, Inc. (American) and Tobacco Workers International Union and its Local 182 (union) on behalf of black employees and black persons who sought employment at American's Richmond, Virginia, leaf department. The complaint contained general allegations that defendants denied equal opportunities for hiring, promotion, transfer and on-the-job training for blacks, thus restricting them to lower paying and less desirable jobs, that defendants pay lower wages to blacks for like work than

they pay to white employees, that the union has failed to represent blacks fairly, has acquiesced in discrimination against them and has entered into collective bargaining agreements intended to discriminate against them, and that the defendants have disciplined and discharged black employees solely because of their race.

After answers were filed, the parties engaged in extensive discovery for a period exceeding one year. The discovery included the taking of nineteen depositions and the analysis of boxes of written material tendered in response to some of the six sets of interrogatories. By March 1, 1977, the scope of the action was restricted; and on that date the district court, pursuant to F.R.Civ.P. 23(b)(2), certified a class consisting of:

1. All black persons, whether currently employed or not, who were seasonal employees of American Tobacco Company's Richmond Leaf Plant on or after September 9, 1972; and

2. All black persons who applied for seasonal employment at the American Tobacco Company's Richmond Leaf Plant at any time on or after September 9, 1972.

The facts, accepted by the district court for the purpose of deciding whether to approve and enter the decree, were that American operates the Richmond Leaf Department for the purpose of processing and storing leaf tobacco. It has two types of employees: seasonal, whose period of employment is between six and nine months each year, and regular, who are employed full-time for the entire year. The union has exclusive bargaining rights for all hourly-paid production unit positions.

American employs approximately 150 seasonal employees, *all* of whom, as of June 2, 1977, were black, and approximately 100 regular employees, of whom 66% were black. Plaintiffs are not aware of any white individuals who have ever been employed as seasonal employees.

Prior to September 1963, the regular job classifications of truck driver, watchman, maintenance storage, and boiler operator at the Leaf Plant were reserved for whites only. As of February 15, 1976, these positions were staffed as follows:

Position	*Whites*	*Blacks*
Truck Drivers	5	4
Watchmen	15	1
Maintenance Storage	1	0
Boiler Operators	0	3

Regular employees have the right to obtain any permanent position for which the union has bargaining rights within the Richmond Leaf Department. Seasonal employees have the right to obtain any seasonal position for which the union has bargaining rights within the Richmond Leaf Plant. Seasonal employees may transfer to positions in regular classifications only when no regular employee desires that position. Should the seasonal employee transfer to a regular position, he loses all of his seniority and is treated as a new hire for seniority purposes. Separate seniority rosters are maintained for regular and for seasonal employees.

When a seasonal employee transfers to a regular position, he is placed at the bottom of the regular seniority roster irrespective of the number of years he has worked as a seasonal employee with American. This loss of senior-

ity affects his status for promotions, demotions, lay-offs, recalls and vacations, and, in short, the principal terms and conditions of his employment.

Since 1971, the vast majority of applicants and new hires at all of American's locations in the Richmond area have been black, as indicated by the following chart:

	Applicants		*New Hires*	
Year	*Blacks*	*Whites*	*Blacks*	*Whites*
1971	97	1	88	1
1972	118	5	97	2
1973	94	4	93	1
1974	71	7	64	2
1975	77	3	22	2

The racial composition of the production unit at the Richmond Leaf Department is as follows:

	Regular Employees		*Seasonal Employees*	
Year	*Whites*	*Blacks*	*Whites*	*Blacks*
1968	41	52	—	116
1970	40	59	—	175
1973	40	56	—	176
1976	37	57	—	135

Of the 35 supervisory positions at American's Richmond Leaf Department as of April 5, 1976, seven, or 20% were filled by blacks. Of the 229 persons in hourly paid production unit jobs at the Richmond Leaf Department in that same year, 192, or 84% were black.

The consent decree was negotiated by counsel during the months of February and March, 1977. Agreement was

reached less than a week before the trial of the case was scheduled to begin. Counsel were all thoroughly experienced in Title VII class action litigation, including, but not limited to, such suits in the tobacco industry.

The proposed consent decree contained five substantive provisions:

1. Every current and future regular hourly-paid production employee would be credited with seniority for actual time worked as a seasonal employee. Thus, seasonal employees would not lose seasonal seniority by transferring to regular positions and the seniority deterrence to transfers from seasonal to regular employment would be removed.

2. Regular employees who successfully served a probationary period as seasonal employees would not be required to serve another probationary period to become eligible for medical and sick benefits. Again, a deterrence to transfers from seasonal to regular employment was removed.

3. In the event that vacancies in hourly-paid permanent production job classifications are not filled by regular production employees, seasonal production employees will be given the opportunity to fill them before there is hiring from the outside. This gives seasonal employees the opportunity to bid on vacancies in regular production jobs, some of which were at one time reserved for whites only, before any outside hiring.

4. Seasonal employees shall have the opportunity to bid on vacancies in the watchman job classification prior to hiring from the outside. This provision duplicates "3," except that it is restricted to the watchman classi-

fication. The watchman classification was probably given separate treatment because as of February 15, 1976, there had been less black penetration than in any other formerly all-white classification.

5. A goal is set for the Leaf Department for the filling of Foreman and Assistant Foreman supervisory positions with qualified blacks until one-third of such positions are filled with blacks. The date of December 31, 1980 is fixed as the date for accomplishment of this goal.

With respect to monetary claims of individual members of the class, the consent decree recites that there was no discriminatory hiring and therefore the members of Class 2 (black persons who applied for seasonal employment on or after September 9, 1972, but were not hired) are entitled to no monetary relief. By contrast, those falling into Class 1 may be entitled to monetary relief and the procedures for proving and asserting a claim are specified. Notice of the proposed decree will be given to members of Class 1 with an opportunity for them to object before the decree becomes final. No notice is to be given to members of Class 2 notwithstanding that the decree adversely adjudicates their claim to monetary relief.

After all counsel tendered the consent decree, the district court conferred with counsel and required them to file memoranda of facts and of law in support of the decree. After the memoranda were filed and considered, the district court filed its memorandum disapproving the consent decree and declining to enter it.

The major premise of the district court's memorandum was that it should neither approve nor enter a consent decree that perpetuates, promulgates or acquiesces in dis-

crimination on the basis of race. The district court then made a general review of the decided cases construing Title VII and some of its legislative history; and after deducing what it thought were applicable general principles, it turned to a consideration of the five substantive provisions of the proposed decree. It disapproved of giving seniority credit for seasonal employment, because seasonal employees have always been black; and therefore the effect of giving seniority credit for seasonal employment will be to give preferential treatment on the basis of race in violation of Title VII. For the same reason, it disapproved of the provision excusing regular employees from a probationary period when they had successfully served a probationary period as seasonal employees. Similarly, the provisions giving seasonal employees a right to bid on vacancies in hourly-paid permanent production job classifications and the watchman classification before hiring from the outside were disapproved as illegal preferential treatment of blacks solely on the basis of race since only blacks were seasonal employees. Finally, the district court construed the goal for filling the supervisory force as an illegal racial quota and disapproved it.

II.

We consider first the question of our jurisdiction. We do so in the light of the congressionally articulate policy to redress discrimination in employment "by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). This policy, in our view, favors settlement of claims of discrimination in employment. When, as here, the parties' settlement of their dispute has been rejected by the district court, there is a compelling reason to review the propriety of the rejection if review is arguably permitted under established appellate jurisdiction.

The order from which this appeal is taken is interlocutory. We agree with the majority that there is no right to appeal every interlocutory decision of a district court. However, there are exceptions to this general rule, both judge-made, i.e., *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), and statutory. The significant exception to be considered here is that contained in 28 U.S.C. § 1292(a)(1):

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, *refusing* or dissolving *injunctions,* or refusing to dissolve or modify injunctions. . . . (Emphasis added.)

It is our view that the order declining to approve the settlement was an order refusing an injunction. As we have earlier set out, the settlement would have required American and the union to take a number of affirmative steps. It would have required that hourly-paid production employees be given seniority for service as seasonal employees; it would have required that such employees be eligible for medical and sick benefits without serving another probationary period; it would have given seasonal employees a preference for employment in certain permanent positions; it would have given seasonal employees a preference over outsiders in bidding for vacancies in the watchman classification; and it would have fixed a goal in the hiring of qualified blacks in the positions of Foreman and Assistant Foreman. The parties themselves termed the proposed consent decree as one "enjoining" American and the union from discriminating against black employees and titled the

five affirmative actions that we have described as "Injunctive Relief For the Class."

In *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135 (4 Cir. 1978), *cert. denied*, 439 U.S. 1089, 99 S.Ct. 871, 59 L.Ed.2d 56 (1979), a panel of the court held that an interlocutory order in an employment discrimination case which adopted guidelines proposed by plaintiffs was appealable. Those guidelines required the employer and the union to supply a list of members eligible for back pay, required them to pay interim attorneys' fees, required the development of job descriptions, required that certain transfers of employees not be limited, required the hiring of permanent and seasonal employees, required that employees be advised of vacancies, and required that employment applications remain viable for not less than one year. In rejecting the argument that the order was not appealable because it was not a final order granting relief, the court said:

> We believe the guidelines, requiring the defendants to act in some instances and forbidding them to act in others, to be an injunction. We do not agree with the plaintiffs' position that the guidelines, although requiring present affirmative action or restraint, are yet unappealable. (Footnote eliminated.)

577 F.2d at 1139.

Surely *Lewis* was correctly decided, and surely it is indistinguishable from the instant case. The proposed consent decree was an injunction,[1] and had it been entered it would have been appealable under *Lewis*. The refusal

---

[1] We note that even the majority concedes that the consent decree was an injunction. "Here, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings." Majority op. p. 423.

to enter the proposed consent decree is equally appealable, because § 1292(a)(1) authorizes an appeal from an interlocutory order "refusing" an injunction.

We are at a loss to understand why the majority fails to conclude that *Lewis* decides this case and why the majority holds the order in the instant case non-appealable. Certainly the holding in *Seigal* v. *Merrick,* 590 F.2d 35 (2 Cir. 1978), does not support that result. *Seigal* concerned the settlement of a derivative stockholders' suit. The granting of stock options in exchange for certain cash consideration bears little resemblance to the entry of an injunction. Indeed, in *Seigal* the only issue litigated was whether the order refusing approval of the settlement was appealable under 28 U.S.C. § 1291 under the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp., supra.*[2] No claim was made that, as here, the order was appealable under 28 U.S.C. § 1292(a)(1).

Nor do we think that *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 98 S.Ct. 2451, 57 L.Ed.2d 364 (1978), holding that pretrial denial of class certification in a Title VII case is not appealable under § 1292(a)(1), controls here. The rationale of that case is that the order denying certification "could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claim; and it did not pass on the legal sufficiency of any claims for injunctive relief." *Id.* at 480-81, 98 S.Ct. at 2453. By contrast, if the consent decree in the instant case is not approved now, as a practical matter

---

[2] It should be noted that, in *Norman* v. *McKee,* 431 F.2d 769 (9 Cir. 1970), *cert. denied,* 401 U.S. 912, 91 S.Ct. 879, 27 L.Ed.2d 811 (1971), the Ninth Circuit reached the opposite result and held that the refusal to enter a settlement of a derivative stockholders' suit was appealable.

the propriety of the proposed settlement will not be raised again either in the district court or before us. The consent decree, if entered, would settle finally the rights of the parties, subject only to possible modification at the instance of a dissatisfied member of the class; and, notwithstanding the standard recital that defendants disclaimed liability, it would in actuality hold them to have violated Title VII.

Similarly, a holding that the denial of a motion for summary judgment, which if granted would include injunctive relief, is not appealable, *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 87 S.Ct. 193, 17 L.Ed.2d 23 (1966), does not decide this case. "[T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial." *Id.* at 25, 87 S.Ct. at 195. By contrast, the order appealed from in the instant case does much more; in rejecting the consent decree, the district court relied on conclusions adverse to plaintiffs' claims on the merits—conclusions which plaintiffs now ask us to review. Nor is the instant case decided by *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). There, the district court granted partial summary judgment as to liability in a Title VII employment case, but before an actual injunction was formulated and entered, the employer appealed. The Court held that the order was not appealable under § 1292(a)(1) since no injunction had been issued, nor had an injunction been refused. Significantly, it added that "had [the district court] granted injunctive relief but had not ruled on respondents' other requests for relief, this interlocutory order would have been

appealable under §1292(a)(1)." *Id.* at 744, 96 S.Ct. at 1207.

Thus, we conclude that we have and should exercise appellate jurisdiction.

III.

Because we would hold that we possess and should exercise appellate jurisdiction, we are brought to the merits of the case.

The law of this circuit with reference to the function of the district court in approving or disapproving a settlement of Title VII sex discrimination litigation, as well as our function on appeal, was settled in *Flinn* v. *FMC Corporation,* 528 F.2d 1169 (4 Cir. 1975), *cert. denied,* 424 U.S. 969, 96 S.Ct. 1462, 47 L.Ed.2d 734 (1976). We think that the same standards apply to settlement of Title VII race discrimination litigation.

In *Flinn,* to summarize Judge Russell's detailed and scholarly opinion, we said that the most important factor that the district court must consider is the strength of the plaintiffs' claims on the merits and that, in making that evaluation, the district court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement. These elements are important, Judge Russell wrote, because the completion of discovery ordinarily permits a reasonable evaluation of the merits of a claim, and the opinion of competent counsel, absent a showing of collusion and bad faith, is entitled to great weight. Also to be considered is the attitude of the class members and whether they favor or oppose the settlement. Judge Russell cautioned that while the adequacy of a settlement should

be appraised, the district court should not turn its consideration of the settlement into a trial or rehearsal of the trial or make dispositive conclusions on the unsettled legal issues in the case. Finally, Judge Russell called attention to the legislative intent to encourage settlements, expressed in Title VII. 528 F.2d at 1172-74.

Although our review is limited to determining whether the district court abused its discretion in the action that it took, 528 F.2d at 1172, we are persuaded that in the instant case there was an abuse of discretion, in disapproving the settlement, except in one small particular with respect to notice to members of Class 2 plaintiffs whose rights were being adjudicated adversely to them. We reach this conclusion from a consideration of the factors identified in *Flinn*.

There can be no doubt that counsel for all parties to this litigation are highly competent and experienced lawyers with substantial experience in dealing with Title VII racial discrimination employment cases. They reached a settlement on the eve of trial after all reasonable discovery had been completed and after lengthy negotiations. There is not the slightest basis to suggest that they negotiated collusively or in bad faith. The fact that they, who know the case best and know their respective clients' strengths and weaknesses with respect to the issues, have agreed to the settlement and recommend it to the court is entitled to very great weight.

The attitude of members of the class is as yet unknown since the decree will not be exhibited to them until it is entered. But the entry will be in effect an order *nisi* and the district court will have full opportunity to assess the objections, if any, of the members of *both* classes and to enter such further orders as are proper.

Of course the recommendations of even experienced, competent counsel will not suffice to warrant the entry of a consent decree if its terms depart markedly from the plaintiffs' case. We do not disagree with the district court's major premise that a consent decree should not be entered which is in violation of law, but it is manifest since the decision in *United Steelworkers of America* v. *Weber,* —— U.S. ——, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), which was announced after the submission of the case to the in banc court, that the proposed consent decree does not fall into that category. *Weber* unequivocally held that a private, voluntary, race-conscious affirmative action plan which reserved for black employees 50% of the openings in an in-plant craft training program until the percentage of black craft workers in the plant is commensurate with the percentage of blacks in the local labor force did not violate Title VII. Since the plan was adopted by private parties, there was no question presented of an alleged violation of the Equal Protection Clause of the Constitution.

In the light of *Weber,* we would have little difficulty in holding that, by voluntary agreement, seasonal employees, all of whom were black, could be given seniority credit for the time that they worked as seasonal employees as well as credit toward their eligibility for medical and sick benefits, that they could be given preference in bidding for vacancies in hourly-paid permanent production job classifications, that they could be given preference in bidding for vacancies in the watchman job classification, and that a goal to fill supervisory positions in the Leaf Department with qualified blacks until one-third of the positions are filled with blacks could be set, all without violating Title VII.

We do not fault the district court for not anticipating *Weber*. But now that *Weber* has been decided, it is obvious that the district court fell into error as a result of its failure to recognize that the parties agreed to the substantive provisions of the consent decree to redress past discrimination and the present effects of past discrimination. Remedial steps of the type employed are legal and proper to redress discrimination. They were included not to favor plaintiffs because they are black but to make them equal by undoing the unlawful discriminations which had been practiced against them because they were black. This is the whole purpose of Title VII and of this lawsuit. The fact that the consent decree contained language to the effect that American and the union deny "discriminatory conduct," while plaintiffs similarly withhold any admission that any of American's employment practices are legal, should not hide the fact that plaintiffs, arguably at least, have a cause of action under Title VII for racial discrimination in employment and although American and the union, arguably at least, have good defenses, the parties, consistent with the intent of Title VII, should be allowed to compose their differences and reach an amicable settlement of the matter. Disclaimers of liability and disclaimers of admissions of legality are not uncommon in settlement agreements, as well as in consent decrees. A ruling that litigation may not be settled unless a party formally admits liability, or formally concedes legality, or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights. Certainly it would ban settlements in

Title VII cases in violation of congressional intent where the purpose of the settlement is to avoid an adjudication.

Since Title VII encourages settlements and since the settlement embodied in the proposed consent decree was one negotiated by competent, experienced counsel in full possession of all discoverable facts, and since we perceive no unfairness or manifest illegality in the manner in which the parties propose to compose their differences, we think that it was an abuse of discretion for the district court to decline to approve and to refuse to enter the consent decree.[3]

IV.

We would therefore assert jurisdiction over this appeal, reverse the judgment of the district court, and direct it to enter the proposed decree, modified only with respect to notice to members of Class 2, *see* note 3 *supra*. Because

---

[3] We think that the proposed decree should be modified in one minor respect. The consent decree provides that after its entry notice of its terms will be given to all members of Class 1 (black persons, whether currently employed or not, who were seasonal employees at any time after September 9, 1972), by posting on American's bulletin boards and by mail to each person included in the class. The notice must advise every class member that he has a right to object to the decree, the time in which to lodge an objection and the place to file written objections. Similar notice is not required to be given to members of Class 2 (black persons who sought but did not obtain seasonal employment after September 9, 1972), although the decree provides that they "are not entitled to assert claims for monetary relief."

We think that the consent decree should give the same notice to members of Class 2 as will be given to members of Class 1. If, notice to members of Class 2 having been given, an objection to the decree, having arguable merit, is lodged, there will be need for a new representative of the class. *See Goodman* v. *Schlesinger*, 584 F.2d 1325 (4 Cir. 1978), and *Cox* v. *Babcock & Wilcox*, 471 F.2d 13 (4 Cir. 1972).

the majority finds that it lacks jurisdiction over this appeal, we are constrained to add a further comment. The majority's jurisdictional decision in no way touches the merits or approves the action taken by the district court. Moreover, it is grounded firmly on the fact that the order of the district court refusing to enter the consent decree is not a final judgment:

> Under the *Flinn* analysis, the named parties may present a proposed decree to the district court in any form and at any stage in the proceedings. If one decree is refused another may be proposed. At any time the district court can reconsider its refusal to enter a decree.

Majority op. at 424.

> We agree that the district court has the power to reconsider its order. Further, we believe that *Weber* so undercuts the theory on which the district court declined to enter the consent decree that, when the case is returned to the district court, it may well, on its own motion or at the instance of counsel for plaintiffs, conclude to reconsider its ruling in light of *Weber*. If reconsidered, we feel confident that the district court will conclude that Title VII presents no bar to approval of the consent decree.

Opinion of the District Court

September 14, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RICHMOND, VIRGINIA

No. 77-2260

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Appellants,

v.

AMERICAN BRANDS INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Appellees.

This Opinion is recorded at 446 F. Supp. 780.

MEMORANDUM

WARRINER, *District Judge.*

I

Plaintiffs brought this class action against the above-named defendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* as amended, 42 U.S.C. § 1981 and the Fourteenth Amendment. Jurisdiction is invoked pursuant to 42 U.S.C. § 2000e 5(f) and 28 U.S.C. § 1343(4).

Negotiations in an attempt to settle the issues raised by the complaint have resulted in a proposed Consent

Decree which the parties requested the Court to enter at the final pretrial conference on 1 April 1977. At that conference, the Court expressed concern that certain provisions of the Decree might be violative of the law and that provisions of the Decree would affect parties other than those before the Court. The Court noted that the parties were jointly seeking entry of the Decree and to that extent were no longer in an adversary posture. The Court requested counsel to brief the issues of concern. The briefs having been filed the Court must now decide whether or not it is just and proper and in accordance with the law to enter the Decree.

II

Plaintiffs have included a statement of facts in their brief in support of the proposed Consent Decree. For this purpose only, we accept these facts to be true as follows:

The defendant American Brands, Inc. (hereinafter referred to as the "Company"), operates the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia, for the purpose of processing and storing leaf tobacco. The defendant Local 182 Tobacco Workers International Union has exclusive bargaining rights for the establishment of wage rates and other terms and conditions of employment for all hourly paid production unit positions at the Richmond Leaf Department. The defendant Tobacco Workers International Union is a national organization consisting of local unions, including Local 182.

The plaintiffs are present and former black seasonal employees at the Richmond Leaf Department and held jobs under the jurisdiction of Local 182, TWIU, during their employment. As seasonal employees, the plaintiffs all worked at the Richmond Leaf Plan an average of six

months each year. Regular employees worked at this same facility all year.

The Company employs approximately 150 seasonal employees, *all* of whom at the present time are black, and approximately 100 regular employees, of whom 66% are black. Plaintiffs are not aware of any white individuals who have ever been employed as seasonal employees at the Company's Richmond Leaf Plant.

Prior to September 1963, the regular job classifications of truck driver, watchman, maintenance, storage, and boiler operator at the Leaf Plant were reserved for whites only. As of 15 February 1976 these positions were staffed as follows:

Position	*Whites*	*Blacks*
Truck Drivers	5	4
Watchmen	15	1
Maintenance Storage	1	0
Boiler Operators	0	3

Regular employees have the right to obtain any permanent position for which the TWIU has bargaining rights within the Richmond Leaf Department. Seasonal employees have the right to obtain any seasonal position for which the TWIU has bargaining rights within the Richmond Leaf Plant. Seasonal employees may transfer to positions in regular classifications only when no regular employee desires that position. Should the seasonal employee transfer to a regular position, he loses all of his seniority and is treated as a new hire for seniority purposes. Separate seniority rosters are maintained for regular and for seasonal employees.

When a seasonal employee transfers to a regular position he is placed at the bottom of the regular seniority

roster irrespective of the number of years he has worked as a seasonal employee with the Company. This loss of seniority affects his status for promotions, demotions, lay-offs, recalls and vacations, and, in short, the principal terms and conditions of his employment.

Since 1971, the vast majority of applicants and new hires at all of the Company's locations in the Richmond area have been black, as indicated by the following chart:

Year	*Applicants*		*New Hires*	
	Blacks	*Whites*	*Blacks*	*Whites*
1971	97	1	88	1
1972	118	5	97	2
1973	94	4	93	1
1974	71	7	64	2
1975	77	3	22	2

The racial composition of the production unit at the Richmond Leaf Department is as follows:

Year	*Regular Employees*		*Seasonal Employees*	
	Whites	*Blacks*	*Whites*	*Blacks*
1968	41	52	—	116
1970	40	59	—	175
1973	40	56	—	176
1976	37	57	—	135

Of the 35 supervisory positions at the Company's Richmond Leaf Department as of 5 April 1976, seven, or 20%, were filled by blacks. Of the 229 persons in hourly paid production unit jobs at the Richmond Leaf Department in that same year, 192, or 84% were black.

III

In the proposed Consent Decree defendants "expressly deny any violation of . . . any . . . equal employment law, regulation, or order." Plaintiffs conversely state that "consent to this Decree does not constitute a finding or admission that any of the employment practices of . . . [defendants] are lawful." The proposed Decree further states that "the Court finds from the evidence previously filed in the form of answers to interrogatories that there are no discriminatory hiring practices at the Richmond Leaf Department."

In light of the facts outlined above, the foregoing provisions, and the applicable law, the Court questioned the propriety of the following provisions of the proposed Consent Decree:

> In full and final settlement of any and all claims for injunctive relief alleged in the Complaint, the parties agree to the following:
>
> 1. For the purposes of determining eligibility for vacations and for promotions, demotions, lay-offs and recalls, every current and future regular hourly paid production employee of the Richmond Leaf Department will be credited with actual time worked as a seasonal employee commencing with the date of hire of the last period of continuous employment as a seasonal employee in accordance with Section 1 of Article 7 of the current collective bargaining agreement governing seasonal employees. The combined total of such seasonal and regular employment will apply toward service requirements for vacations, and for promotions, demotions, lay-offs and recalls.

2. Regular employees who have served the probationary period as a seasonal employee during the last period of his or her continuous seasonal employment at Leaf prior to being transferred to regular Leaf employment will become eligible for medical benefits and sick benefits immediately upon such transfer to regular employment.

3. In the event that vacancies in hourly paid permanent production job classifications at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

4. In the event that vacanies in the job classification, Watchman, at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

5. The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such postions equals ⅓ of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

IV

Before discussing these provisions specifically, a general discussion of what this Court perceives to be the controlling law is appropriate.

Plaintiffs based this suit on Title VII, Section 1981 and the Fourteenth Amendment. As defendants herein are private parties, the Court does not find the precepts of the Fourteenth Amendment to be applicable *per se*. But the guarantees of the Equal Protection clause against State action by the Fourteenth Amendment nevertheless are afforded plaintiffs by Title VII and Section 1981 which, with respect to private parties defendant, have their underpinnings in the Thirteenth Amendment. This Court is also cognizant that the Supreme Court of the United States has read the guarantees of the Equal Protection clause into the Due Process clause of the Fifth Amendment protecting against arbitrary and capricious[1] federal action.

Thus, the Fifth Amendment may well protect citizens against arbitrary and capricious federal action in the form of a federal court Consent Decree that would place a federal stamp of approval, with the full force and effect of contempt proceedings, to what would otherwise be a mere agreement between private parties. *See Shelley* v. *Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1947). In sum, we opinion that the mandates of the United States Constition as well as the statutes invoked by plaintiffs require us to insure that this Court plays no role in perpetuating, promulgating or acquiescing in improper discrimination on the basis of race.

V

Keeping the above in mind, we shall focus on the law of Title VII as this statute speaks specifically to the area

---

[1] *See e.g., Richardson* v. *Belcher*, 404 U.S. 78, 81-82, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Flemming* v. *Nestor*, 383 U.S. 603, 612, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Bolling* v. *Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1934).

of concern herein, that is, discriminatory employment practices.

Title VII states in pertinent part that it is unlawful:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. [42 U.S.C. § 2000e-2(a)].

The provisions of Subsection (j) read as follows:

> (j) *Preferential treatment not required on account of numerical or percentage imbalance.* Nothing contained in this title [42 U.S.C.S. §§ 2000e—2000e-17] shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by an employer, referred or classified for employment by any employment agency or labor organization, admitted

> to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Title VII plainly and distinctly prohibits racial discrimination in any and all aspects of employment practices including but not limited to recruitment, promotions, seniority and benefits. The language clearly prohibits discrimination against whites as well as blacks on account of race and clearly makes no exception for alleged benign motives such as rectifying the effects of past discrimination. Indeed, Subsection (j) explicitly states that preferential treatment is not required to rectify racial imbalance. To be sure, Title VII does not exclude use of extraordinary measures to make those individuals who actually suffer from the results of past or present discrimination whole, but such action is more aptly characterized as equitable, not preferential, treatment. And even in this context, the courts have been careful to minimize whatever adverse effects may result with respect to innocent third parties.

The legislative history of Title VII clearly supports what this Court understands to be its clear and unequivocal mandate. In response to a charge that the Title VII appeared to force employers to grant preferential treatment, Senator Harrison Williams retorted:

> Those opposed to H.R. 7152 should realize that to hire a Negro solely because he is a Negro is racial

> discrimination, just as much as a "white only" employment policy. Both forms of discrimination are prohibited by Title VII of this Act. The language of that title simply states that race is not a qualification for employment. Every man must be judged according to his ability. In that respect, all men are to have an equal opportunity to be considered for a particular job. Some people charge that H.R. 7152 favors the Negro, at the expense of the white majority. But how can the language of equality favor one race over another? *Equality can have only one meaning, and that meaning is self-evident to reasonable men.* [*Legislative History of Title VII and XI of the Civil Rights Act of 1964, United States Equal Employment Opportunity Commission, U.S. Government Printing Office, 1969, page 3189.*]

Senator Williams' understanding as above expressed in advocating passage of Title VII was shared by Senators Clark and Case:

> There is no requirement that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever the imbalance may be, would involve a violation of Title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. [110 Cong.Rec. 7213, April 8, 1964]

Further, at the behest of the bill's sponsors, the Department of Justice submitted a memorandum stating:

> Finally, it has been asserted that Title VII would impose a requirement of "racial balance." This is incorrect. There is no provision, either in Title VII or in any other part of this bill that requires or authorizes any federal agency or federal court to require preferential treatment for any individual group for the purpose of achieving racial balance.
>
> No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to gentiles, Italians to English, or women to men. [110 Cong.Rec. 7207, April 8, 1964.]

Neither the Supreme Court nor the Fourth Circuit has dealt squarely with the question of the legality of preference and/or quotas under Title VII. However, both Courts have discussed the issue in dicta. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) the Supreme Court stated:

> Congress did not intend by Title VII to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. [401 U.S. at 430-431, 91 S.Ct. at 853].

The Supreme Court, in the more recent decision of *McDonald* v. *Santa Fe Transportation Co.*, 423 U.S. 923, 96 S.Ct. 264, 46 L.Ed.2d 248 (1976), made clear, though not in the factual context of an affirmative action program, that Title VII's protection from racial discrimination applied to whites as well as blacks. Close in time to *McDonald,* the Court in *Franks* v. *Bowman Transportation Co.*, 423 U.S. 814, 96 S.Ct. 25, 46 L.Ed.2d 32 (1976) did award constructive seniority and back pay to remedy racial discrimination against blacks and this remedy may have adversely affected seniority rights of innocent white employees. However, this relief was unequivocally restricted to individual, identifiable, persons who were otherwise qualified for the positions they sought but had been denied on account of race.

Similarly, the Fourth Circuit has consistently limited remedial relief under Title VII to actual persons who were victims of unlawful discrimination, thereby minimizing disruption of the working lives and expectations of other innocent employees.

In *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir.) *cert. denied* 425 U.S. 935, 96 S.Ct. 1666, 48 L.Ed.2d 176 (1976), a case which appears to be factually close to this one, the Court, with some modification, affirmed the district court's decree. *Russell* was a class action brought by black employees against their employer and union for engaging in racially discriminatory employment practices. The discrimination involved three departments of the company: Leaf, Prefabrication and Fabrication. The Leaf Department was located in Rockingham County and the Prefabrication and Fabrication Departments were housed in the Reidsville plant. Each department had a separate seniority roster. The district court found, *inter alia,* that

defendant's discriminatorily preserved higher-paying jobs in the Fabrication Department for white employees after enactment of Title VII. The Circuit Court clarified this finding by holding that the disparity of treatment of the employees at the Leaf Department and the Prefabrication Department was also a product of this discriminatory design:

> If Branch and Leaf are both parts of the same operation, this case presents a straightforward application of the well-accepted principle that discriminatory hiring in departments of a business may be remedied by requiring the company to allow transfers between departments, based on plant-wide seniority. *See e. g. Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505 (E.D. Va. 1968) . . . [Hence] we conclude that regular and seasonal black employees at Leaf *who were hired before the company eliminated discrimination* at fabrication should be permitted to transfer to that department as permanent vacancies occur *in jobs they can perform.* Further, they should receive the training for which they qualify. A transferee's new departmental seniority should be computed from his employment seniority date. The class of employees entitled to back pay should also be enlarged to include Leaf employees. [528 F.2d at 362-364] [Emphasis added.]

Of particular significance, the Circuit Court affirmed the district court's disallowance of what would have amounted to preferential treatment on the basis of race to those black employees among the class of plaintiffs who were not victims of discrimination:

> Regular and seasonal Leaf employees also seek entry into the prefabrication department, and many seasonal employees seek regular employment in Leaf on the basis of their company seniority. The district court, finding no racial discrimination in hiring at prefabrication and Leaf, denied their requests. We affirm because the Act does not oblige a company to allow black employees to transfer into departments that were always open to black applicants without discrimination. *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 588, 593 (4th Cir. 1972); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971). [528 F.2d at 364.]

The most recent Fourth Circuit case in this area is *Patterson* v. *American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). This Court has discussed its reading of that case at some length in *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673, 679-680 (E.D.Va.1976). Suffice it to say that *Patterson* did not hold that Title VII allows preferential treatment solely on the basis of race to compensate for unlawful past discrimination. More important, insofar as *Patterson* relates to the facts herein, it states that:

> [Title VII] plainly bans the use of preferential hiring to change a company's racial imbalance that cannot be attributed to unlawful discrimination. [535 F.2d at 273].

Title VII, by its own terms, does not *require* preferential treatment to rectify racial imbalance. This language may be interpreted to mean that, although permissible, it is not mandated. *Patterson* states in no uncertain terms that

preferential treatment is banned absent proof of discrimination. As in *Russell* the Court in *Patterson* carefully tailored the relief to cover only actual victims of discrimination. *See also, United States* v. *Chesapeake & Ohio Railway Co.*, 471 F.2d 582 (4th Cir. 1972).

VI

Since Executive Order 11246 is also related to this area, discusion on this point is warranted.

The Court has previously discussed this issue, citing appropriate authority, in *Cramer* v. *Virginia Commonwealth University*, 415 F.Supp. 673, 680-681 (E.D.Va.1976) holding that where Executive Order 11246 is inconsistent with Title VII it is superseded thereby. This Court must additionally note however that the pertinent language of Executive Order 11246 is clearly consistent with the plain language of Title VII:

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be

provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

It is rather the regulations adopted by the Secretary of Labor pursuant to Executive Order 11246 that may be conflicting, in our opinion, with both Title VII and Executive Order 11246. The Secretary's regulations require that contractors develop written affirmative action plans which shall "provide in detail for specific steps to guarantee equal employment opportunity keyed to problems and needs of members of minority groups, including, when there are deficiencies, the devolopment of specific goals and time tables for prompt achievement of full and equal employment opportunity." [41 C.F.R. 60 1.40(a) (1970)]. Insofar as the above quoted regulation serves as an amorphous and euphemistic mandate requiring preferential treatment and imposition of quotas solely on the basis of race, it contravenes the letter and spirit of Title VII. As Title VII supersedes contravening Executive Orders, *a fortiori,* it *supersedes* federal regulations represented to be adopted pursuant to such orders.

VII

Lastly, before examining the provisions in question, something should be said about the nature and legal significance of consent decrees in Title VII class actions.

A recent Fifth Circuit case, *Myers* v. *Gilman Paper Corp.,* 544 F.2d 837 (1977), affords some insight in this area. *Myers* was a Title VII class action brought against a company and union by black employees and former employees who sought affirmative relief for alleged racial discrimination in employment, promotions and transfers. The district court found the union liable on the merits. In

addition the Court entered and approved a consent decree between plaintiffs and the company. On appeal by the union, the Circuit Court held, *inter alia,* that the district court could not approve a consent decree negotiated between plaintiffs and the company that would allow the substitution of a solution for past discrimination in place of that achieved through collective bargaining unless it first determined that the collectively bargained solution either violated Title VII or was inadequate to cure the effects of past discrimination. 544 F.2d at 858-859.

In the course of its memorandum the Court made a number of pertinent remarks. It noted that "[b]efore a court can grant any relief it must find that the defendants engaged in the unlawful employment practice alleged in the complaint" [544 F.2d at 854]. It further made clear "that before a district court can modify seniority provisions [by consent decree or otherwise] there must be a challenge by the plaintiffs to the present provisions and a finding by the court that the present provisions still perpetuate discriminatory effects of prior action." [544 F.2d at 855].

Myers is not on all fours with this case particularly in that the union herein has consented to the decree in question, but *Myers* is sufficiently analogous to be of some import. First, and basic, consent decrees, although looked upon favorably by the courts, are not immune from scrutiny in terms of propriety and legality. This principle is especially true in class actions where the effect of the relief usually has widespread and considerable impact both within and outside the class. For good reason Rule 23(e) of the Federal Rules of Civil Procedure requires that "a class action shall not be dismissed or compromised without the approval of the court . . . ." Further, *Myers*

provides us with the foregoing guidelines in deciding whether or not to grant this approval in a Title VII context.

VIII

With the foregoing review of the law, the Court will consider the several provisions of the proposed Consent Decree.

Provision I of the Decree provides that current and future employees who were, or are to be, employed as seasonal workers at the Richmond Leaf Plant shall be credited with seniority for actual time worked at the plant from the beginning of their employment. Since the pool of employees benefiting from this provision, that is seasonal employees, has been traditionally and are now all black, it appears that benefits are being bestowed on the basis of race. Preferential treatment on the basis of race—any race—violates the Constitution and Title VII. It cannot be countenanced by a court sworn not to subvert but to uphold the law. To be sure, legitimate nonracial business reasons may underlie such a decision. But so also, and more likely in this case, could illegitimate racial considerations. If the reason is the former no decree is required. If the reason is the latter no decree is permitted.

Plaintiffs, in their brief in support of the proposed Consent Decree, say that the relief in Provision I is "exactly the same relief" granted in *Russell* v. *American Tobacco Co., supra.* This assessment is incorrect. There are two paramount distinctions between *Russell* and the instant case: (1) in *Russell* the Court found present discrimination and present effects of past discrimination; (2) the *Russell* Court carefully tailored the relief in an effort to make whole the actual victims.

In the proposed Consent Decree the defendants "expressly deny . . . any unlawful or discriminatory conduct." Plaintiffs state that they make no "admission" that defendant's conduct, with the exception of present hiring practices, is "lawful." This dichotomy does not create any factual basis upon which relief may be granted. Plaintiff does not, by these words, even deny defendants' assertion.

But assuming for the moment that there is evidence of present discrimination or of the present effects of past discrimination, Provision I is still not in line with *Russell*. The *Russell* Court devised an equitable solution to effect relief for actual victims of discrimination. The relief was not granted to employees because they were black but because they were actual, identifiable, victims of racial discrimination. Indeed, that Court refused relief to certain blacks where no evidence existed that they had suffered from racial discrimination. Contrawise, the parties herein have agreed to allow seemingly preferential treatment for "current and future" seasonal employees not because they are victims of racial discrimination, but because those current employees are black and those future employees will almost surely be black. There was no apparent consideration given to whether or not the preferred employees have been, are, or would be subject to racial discrimination. In short, the considerations which were the essence of *Russell* are absent here.

Provision II would allow all seasonal employees who have already served a probationary period as a seasonal employee to avoid having to serve the additional probationary period as a regular employee that would otherwise be required as a condition precedent to eligibility for medical benefits. The Court has the same concern with this provision as it does with Provision I. If this is a business

decision it's none of the Court's business. If it is proposed as relief for blacks it is unlawful as there is no showing that the so-called relief applies and is limited to, victims of racial discrimination and is reasonably related to making such victims whole.

Provisions III and IV are somewhat similar in purpose and effect and may be treated together. Provision III allows seasonal employees to transfer to full time positions, some of which were reserved at one time for whites only, as vacancies occur. Provision IV parallels III but specifically includes "Watchman" classification because the company has a separate eligibility list for that position. Since, as mentioned, the pool from which hires shall be made (seasonal workers) is all black, it is clear that "hiring from the pool" is simply another way of saying "hire black." To reiterate, if defendant chooses to hire from its seasonal workers *because* they are seasonal employees it presumably has a right to do so, but it has no right to a court decree requiring that it do so thus protecting it from claims that the facially neutral procedure was a pretext for preferring blacks over whites in hiring.[2]

Again, plaintiffs say that similar relief was granted in *Russell.* We find nothing in *Russell* to indicate that the class of plaintiffs therein were to be given preferential treatment in hiring over outsiders, but in any event, the foregoing distinctions mentioned with regard to Provisions I and II are applicable here. Plaintiffs admit in their brief that they "have not found any evidence of discriminatory hiring for positions in the hourly production unit." They instead speak of present effects of past discrimination but none of the parties explicate upon these effects, if any,

---

[2] But *see McAleer* v. *American Telephone & Telegraph,* 416 F.Supp. 435 (D.C. 1976).

nor do they point with any specificity to the victims, no less make any attempt to tailor the relief accordingly. The result, whether intended or not, is preferential treatment of blacks solely on the basis of race.

Provision V adopts a "goal" for the company to obtain in filling its supervisory work force to be met by 1980. Despite plaintiffs' protest to the contrary, this Court sees it for what it is, a quota, plain and simple. With respect to quotas this Court reviewed the law recently in *Cramer* v. *Virginia Commonwealth University, supra,* and found that sex based quotas were contrary to both the letter and spirit of the law. The parties have cited the Court to no binding authority that the law is any different with respect to racial quotas. The law reviewed earlier in this opinion affirms the conclusion that racial preferences are forbidden in this nation.

IX

The parties suggest that the decree is intended to overcome the last vestiges of racial discrimination. But the Court perceives no such vestiges. Indeed, the facts admitted by the parties show that with great rapidity and without any decree the artificial racial barriers have completely dissolved at the plant.

The parties further suggest that the decree is a mere redundancy since Executive Order 11246 provides for precisely the procedure and quotas provided for in the Consent Decree. While this Court has held that Executive Order 11246 does not and cannot require racial quotas under our present Constitution and laws, still, if the parties be right this Court has other things to do than enter surplusage in the form of a court order. Court orders are not intended for anything but serious problems.

Finally, the parties say that the mandate of Title VII will be satisfied by adoption of the Consent Decree which is to say that Title VII sanctions preferential treatment and quotas. As we have heretofore demonstrated, Title VII was never so intended. Its strongest supporters specifically and unequivocally disclaimed any intention to turn this country down the mirey road of quotas and racial preferences.

This Court is sympathetic to the need and is aware of the perplexity of rectifying the effects of past racial discrimination and eliminating present racial discrimination. But the mere waving of the banner does not mean that it is appropriately raised; it does not make that which is illegal legal and does not make that which is unjust, just.

In *Quarles* v. *Philip Morris, Inc.*, 279 F.Supp. 505, 516 (E.D. Va. 1967), the Court, speaking with regard to Title VII, stated:

> [T]he legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act. The history leads the court to conclude that Congress did not intend to require "reverse discrimination"; that is, the act does not require that Negroes be preferred over white employees who possess employment seniority. It is also apparent that Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act.

This is the essence of the dilemma courts are faced with in racial discrimination cases. Where the Court has before it victims of discrimination and innocent third parties it has the hard task of fashioning a remedy that will attempt to make the victims whole without unduly affecting the

rights of innocent third parties—a difficult problem indeed but one the Court must confront. The problem must be solved by means of equitable relief, not preferential treatment or quotas. The latter two methods serve to evade and perpetuate rather than face the problem. They apply cosmetic relief to the symptoms, but fail to address the substance of the problem. They give employers and unions a safe refuge from the rigors of non-discriminatory hiring; so long as the quota is met they will be safe. Under the Decree proposed herein any relief to victims of discrimination is incidental, persons who do not deserve to benefit, benefit; and persons who do not deserve to suffer, suffer.

A popular theory is that every black is in some sense a victim of racial discrimination and that all whites share the guilt. This notion perhaps makes preferential treatment and quotas more palatable to some. But a Court of law cannot render decisions on the basis of guilt theories nor may such theories be permitted to influence its judicial thinking. A Court is constrained to perceive victims as subjects of violations of the law and is constrained to perceive guilt in terms of legal guilt. The proposed Consent Decree herein, rather than aiding victims of violations of the law, would itself violate the law and victimize innocent people both black and white.

When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order without prejudice to the right of any person to seek redress for racial discrimination. But this Court will not, by entering the proposed Consent Decree provide the parties with a judicial license to practice racial discrimination.

An appropriate order shall issue.

Order of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0553-R

FRANK L. CARSON, *et al.*,

v.

AMERICAN BRANDS, INC., *et al.*

ORDER

For the reasons stated in the attached memorandum the sketch for a Consent Decree tendered by the parties hereto on 1 April 1977 is REFUSED.

Let the Clerk send a copy of this order to all counsel of record.

/s/ WARRINER
United States District Judge

Date: 1 June 1977
Filed June 2 1977
Clerk, U.S. Dist. Court
Richmond, Va.

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2260

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Appellants,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL; TOBACCO WORKERS INTERNATIONAL UNION,

Appellees.

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the appeal is dismissed.

WILLIAM K. SLATE, II
Clerk

Filed Sept. 14, 1979
WILLIAM K. SLATE, II
Clerk

No. 79-1236

Supreme Court, U.S.
F I L E D
SEP. 15 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
HILL, TUCKER & MARSH
214 East Clay Street
P. O. Box 27363
Richmond, Virginia 23261
(804) 648-9073

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401
(703) 371-3700

JACK GREENBERG
Counsel of Record
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

BARRY L. GOLDSTEIN
806 15th Street, N.W.
Suite 940
Washington, D.C. 20006
(202) 638-3278

Counsel for Petitioners

September 2, 1980

TABLE OF CONTENTS
PLEADINGS

	Page
Docket Entries of the Fourth Circuit.....	iii
Docket Entries of the District Court	vi
Complaint - filed October 24, 1975	1a
Answer of American Brands - filed December 15, 1975	13a
Answer of International Union - filed December 16, 1975	16a
Answer of Local Union No. 182 - filed December 16, 1975	20a
Proposed Consent Decree - filed April 1, 1977	23a
American Brands' Memorandum in Support of Entry of Proposed Consent Decree - filed April 15, 1977	34a
Unions' Memorandum in Support of Entry of Proposed Consent Decree - filed April 18, 1977	42a
Plaintiffs' Brief in Support of the Adoption of the Proposed Consent Decree - filed April 18, 1977	44a
Notice of Appeal filed June 24, 1977	57a
Letter of Defendant American Brands, Inc. to Clerk of the Fourth Circuit -- Dated January 10, 1978	59a

Page

Order of the Fourth Circuit Denying Motion for Summary Reversal - filed January. 31, 1978 ..... 61a

Order of March 27, 1978 Denying Motion for Summary Reversal and Denying Suggestion to Dismiss Appeal..... 62a

Order Establishing Briefing Schedule -- Filed March 28, 1978 ..... 64a

Letter From Clerk's Office, Fourth Circuit, Requiring Briefs On Seigal v. Merrick 65a

Motion of Defendants for Pre-Trial Conference - Dated October 10, 1979.. 67a

Notice of Pre-Trial Conference 69a

Form A. O. 147 (July 1968)

GENERAL DOCKET

UNITED STATES COURT OF APPEALS

FOR THE

FOURTH CIRCUIT

APPEAL FROM	CASE NO.
THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.	77-2260 Civil

Multiple party - LR 19

TITLE OF CASE	ATTORNEYS FOR APPELLANT
Frank L. Carson, Lawrence Hatcher, Stuart E. Mines, Appellants, vs. American Brands, Inc., t/a The American Tobacco Company; Local 182, Tobacco Workers International; Tobacco Workers International Union, Appellees.	P. Peter Sherwood, Esq. 10 Columbus Circle, Suite 2030 New York, NY 10019 212/586-8397 Henry L. Marsh, III, Esq. William H. Bass, III, Esq. Randall G. Johnson, Esq. P. O. Box 27363 Richmond, VA 23261 804/648-9073 John W. Scott, Jr., Esq. 615 Caroline Street Fredericksburg, VA 22401 703/373-2700 ATTORNEYS FOR APPELLEE Jay J. Levit, Esq. Suite 2120 Central National Bank Bldg. Richmond, VA 23219 804/644-5453 Henry T. Wickham, Esq. D. Eugene Webb, Jr., Esq. P. O. Box 1122 Richmond, VA 23208 804/644-6011

No. BELOW: C/A 75-0553-R

JUDGE BELOW: D. Dortch Warriner

DATE OF JUDGMENT: June 2, 1977

NOTICE OF APPEAL FILED: June 24, 1977

DATE	ACCOUNT OF APPELLANT	Received	Disbursed	REMARKS
10/12/77	Clerk's docketing fee	350 00		

GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

CASE NO. 77-2260	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

DATE	PROCEEDINGS	Filed
10/12/77	Record on appeal in one volume (Vol. I) filed and appeal docketed. jb	
10/12/77	Defendant American Brand's Answers to Plaintiffs' Interrogatories in one jacket (Vol. II), Answer of American Brands to Plaintiffs' Second Interrogatories in one box (Vol. III), filed. jb	
10/12/77	Depositions in sixteen volumes (Vols. IV thru XIX) filed. jb	
10/12/77	Order establishing briefing schedule pursuant to LR 19, filed. jb	
10/14/77	Appearance of Levit for appellees (Local 182 & Tobacco Workers Intnl. Union) filed and entered. mjk	
10/17/77	Appearance of Webb and Wickham for appellees (American Brands) filed and entered. mjk	
10/19/77	Appearance of Sherwood for appellants filed and entered. mjk	
10/20/77	Appearance of Scott for appellant filed and entered. mjk	
10/20/77	Appearance of Marsh, Bass & Johnson for appellants filed and entered.	mjk
11/10/77	MOTION of appellant for an extension of time to file brief and appendix to December 20, 1977, filed. MOTION GRANTED. (fls)	
12-20-77	Ten (10) copies of the joint appendix filed. (12-20-77 dmh).	
12-22-77	Twenty-five (25) copies of the appellant's brief filed. (12-22-77 dmh).	
1/11/78	Appellee not to file brief per letter 1/11/78 dbb	
1/17/78	Motion of appellant for summary reversal, filed. (ecr)	
1/25/78	Defendant's response to motion for summary reversal, filed. (ecr) Transmitted to Dulcey along with motion.	
1/31/78	ORDER denying motion for summary reversal, filed. (ecr) Certified copies to Sherwood, Marsh, Bass, Johnson, Scott, Levit, Wickham.	
1/31/78	Motion for summary affirmance, response to motion, proposed order sent to Judges Hall, Haynsworth and Boreman. Copy of appendix sent to Judge Boreman; record retained in Clerk's Office. (JBH/vsl)	
2/7/78	Panel on motion revised to KKH, CFH, HLW. Papers sent to HLW. (JBH/vsl)	
2/8/78	ORDER rescinding this court's order of Jan. 31, 1978, filed. (ecr)	
3/27/78	ORDER denying appellant's motion for summary reversal and denying the suggestion of the American Brands to dismiss appeal, filed.	ecr
3/28/78	ORDER establishing briefing schedule for the appellee, filed. (ecr)	
4/26/78	Twenty _Five (25) copies of the appellee's brief filed.,HD-rbs	
5/15/78	Twenty-Five (25) copies of the appellant's reply brief filed . rbs	
5-30-78	Negative Local Rule 17 disclosure (American Brands, Inc.) filed. dhb	
10-3-78	Cause argued before Judges Winter and Hall, Circuit Judges and Hoffman District Judge and submitted. (wtc)	
2/9/79	Appellants' supplemental memorandum filed. plm	
2/12/79	Supplemental memorandum of appellees filed (mis-directed to district court). plm Transmitted to HLW, KKH, WEHoffman.	
2/22/79	Appellant's supplemental reply memorandum filed. (fls) Transmitted to HLW, KKH, WEHoffman.	
5/14/79	ORDER granting rehearing en banc without oral argument filed. (fls) Copy to Sherwood; Marsh-Bass-Johnson; Scott; Levit; Wickham.	
5/31/79	Appellants' supplement brief on rehearing en banc, filed. Transmitted to CFH, HLW, JDB, DSR, HEW, KKH, JDP.	
9/26/79	Appellee's verified bill of costs filed. (jhl)	

Form A.O. 11a (July 1969)

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. 77-2260	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.

DATE	PROCEEDINGS	Filed
9/14/79	Opinion filed. dismissing the appeal filed. KKH P Winter join by Haynsworth and Butzner dissenting.	
9/14/79	Opinion and Notice mailed to counsel of record and the Clerk of the District Court at Richmond, VA. (wu)	
9/14/79	Judgment filed. (wu)	
10/5/79	Record on appeal in one volume, interrogatories in one box and depositions in one box returned to the Clerk of the District Court at Richmond, Va. (jhl)	
10/5/79	Certified copy of the judgment and printed copy of the opinion handed the Clerk of the District Court at Richmond, Va. (jl)	
10/16/79	Certified copy of the order of the Supreme Court denying certiorari October 1, 1979, filed. jhl	
2/14/80	Notice evidencing the filing petition for writ of certiorari in the Supreme Court February 9, 1980 filed. (No. 79-1236)(jhl)	
06/20/80	Record on appeal in nineteen (19) volumes received from the Clerk of the District Court at Richmond, VA. (wu)	
06/20/80	Certified copy of order granting petition for writ of certiorari (limited to question 1 presented by the petition) June 16, 1980, filed. (wu)	
06/20/80	Certified record in twenty (20) volumes transmitted to the Clerk of the Supreme Court. (wu)	

DOCKET ENTRIES
UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF RICHMOND, VIRGINIA

Dist/ Office	DOCKET Yr.	DOCKET NO.	FILING DATE Mo.	Day	Yr.	J	NO.	O	R	H 21
422-3	75	0553	10	24	75	3	442	1		x

DEMAND 6	OTHER	JUDGE NUMBER	JURY DEM.	DOCKET YR.	DOCKET NUMBER
	Inj.	2212	NO	75	0553-R

PLAINTIFFS

CARSON, FRANK L.
HATCHER, LAWRENCE
MINES, STUART E.

DEFENDANTS

1. AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY
2. LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION
3. TOBACCO WORKERS INTERNATIONAL UNION

CLASS ACTION

CAUSE

Alleged employment discrimination based on race and color - 42 U.S.C. §2000e and §1981; 28 U.S.C. §1343(4), 2201 and 2202; 5 U.S.C. §5596.

ATTORNEYS

John W. Scott, Jr.
Hill, Tucker & Marsh

615 Caroline Street
Fredericksburg,
Virginia 22401

Deft #1 Bradfute W.
Davenport, Jr.
Henry T. Wickham, Esquire
John F. Kay, Jr., Esquire
Kenneth V. Farino, Esquire
Mays, Valentine, Devenport
& Moore
Post Office Box 1122
Richmond, Virginia 23208
644-6011

OUT-OF-STATE COUNSEL

Jack Greenberg
Barry Goldstein
Suite 2030
10 Columbus Circle
New York, N.Y. 10019

Deft #2 & #3
Jay J. Levit, Esquire
Stallard & Levit
Suite 2120
Central National Bank
Bldg.
Richmond, VA 23219
644-5453

Henry L. Marsh, III, Esquire
Hill, Tucker & Marsh
Room 202 P.O. BOX 27363 23261
214 East Clay Street
Richmond, VA 23219

Petitioner

Case set: 5/2/77 1WK
On Merits: 1/27/76 NOON
IPTO
On Liability: Status: 4-5-76 4:00
VI-17.76-
On Motion: 11:30
FITC : 4-1-77 10:00

CHECK HERE	DATE	FILING FEES PAID RECEIPT NUMBER	
IF CASE WAS FILED IN FORMA PAUPERIS	10-24-75	88150	FF

CO. NUMBER		STATISTICAL CARDS CARD	DATE MAILED
C1027	15.00	JS5	
		JS6	

UNITED STATES DISTRICT COURT D.C. 1/75
DOCKET

DATE	NR.	PROCEEDINGS	
1975			
Oct. 24		Complaint filed and summonses issues. No trial by jury demanded.	sig
Nov. 20		Marshal's rets on sumns exec. filed.	lg
Nov. 24		ORDER that the Deft Unions shall have until 12/15/75 to respond to the Complaint, ent. 11/24/75, DDW, filed. Copies mailed to counsel of record as directed.	bah
No. 24		ORDER that the time within which the Deft American Brands, Inc. shall have to file its Answer to Pltf's Complaint is extended to and including 12/15/75, FHT. 11/24/75, DDW, filed. Copies mailed to counsel of records.	bah
Dec. 12		Pltf's First Interrogatories to Defts, filed.	bah
Dec. 16		Deft's Tobacco Workers Local Union 182 Answer and Affirmative Defenses, no jury requested, filed.	jlm

CONTINUED ON NEXT SHEET

Dec. 16	Deft's Tobacco Workers' International Union 182's Answer and Affirmative Defenses, no jury requested, filed.	jlm
Dec. 15	Answer to American Brands, Inc., no jury requested, filed.	jlm

1976

Jan. 12	Answers of American Brands, Inc. to Pltfs' First Interrogatories to Deft, filed. Attached exhibits A thru. F.	bah
Jan. 27	IPTO, non-jury, ent, 12-27-76, DDW, filed.	lg
Jan. 28	Pltfs' Second Interrogatories to Deft. Company, filed.	apc
Feb. 11	Objections by Defts to Pltfs' Interrogatories, filed.	bah
Feb. 23	Statement of Authorities in Support of Pltfs' Response to Deft's Objections to Interrogatories, filed.	bah
Feb. 23	Pltfs' Response to Deft's Objections to Interrogatories, filed.	bah

CONTINUED ON NEXT SHEET

Mar. 11	ORDERED that time within which Deft. American Brands has to answer Pltfs' Second Interrogatories extended to & Including 04/05/76 ENTERED by RRMjr on 03/11/76 & filed. Copies mailed to all counsel of record.	apc
Mar. 23	American Brands' First Set of Interrogatories to Pltfs, filed.	bah
Apr. 5	Answers to American Brands, Inc. to Pltfs' 2nd Interrogatories to Defts, filed (brown expandable folder) - (Attachment to Answer to No. 45 in box in Room 340).	bah
Apr. 6	Pltfs' First Interrogatories to Deft. Unions, filed.	apc
Apr. 20	ORDER that the time within which Pltfs have to answer American Brand's First Set of Interrogatories to Pltfs is extended to and includes, 5/24/76, ent. 4/19/76, DDW, filed. Copies mailed to all counsel of record.	bah
May 7	ORDER that Deft Unions shall have until 5-26-76 to respond to pltfs' interrogatories, ent. 5-7-76, DDW, filed. Copies mailed.	jlm

CONTINUED ON NEXT SHEET

May 27	Deft Tobacco Workers' Answers to 1st Interrogatories of pltf, filed.	jlm
May 27	Deft Local 182's Answers to 1st Interrogatories of pltf with exhibits, filed.	jlm
May 28	ORDER allowing pltfs until 6-7-76 to answer American Brands's 1st Interr. ent 5-27-76, DDW, filed. Copies mailed counsel.	lg
June 9	ORDER allowing pltfs to 6-10-76 to answer Amer. Brands' 1st Set of Interrogatories to pltfs, ent. 6-9-76, RRMjr, filed. Copies mailed.	jlm
June 9	Pltfs' Answers to American Brands' 1st Interrogatories to pltf, filed with attachments.	jlm
June 21	Local 182's First Interrogatories to Pltfs, filed.	bah
June 19	Pltfs' Answer to Local 182's First Interrogatories to Pltfs, filed.	bah
July 21	Deft American Brands' 2nd Set of Interrogatories to Pltf, filed.	jlm
Aug. 4	Refiled Consolidated Answers of Local 182 and TWIU to First Interrogatories of Pltf, filed.	bah

CONTINUED ON NEXT SHEET

Aug. 6	ORDERED counsel for Pltf. deliver to Clerk of Court check for $25 to compensate counsel for Local Union 182 & check for $25 to compensate counsel for Standard Brands; Clerk shall upon receipt of same deliver same to respective counsel for Defts, ENTERED by DDW on 08-04-76 & filed. Copies mailed to all counsel of record.	apc
Aug. 23	Pltfs' Response to American Brand's 2nd Set of Interrogatories, filed.	jlm
Oct. 6	Deft American Brands' Notice to Take Depositions of Lawrence Hatcher, et al on Oct. 20-21, 1976, filed. Subpoenas issued.	jlm
Nov. 3	Deposition of Richard Haskell Norrison taken on behalf of the Pltfs on 08/05/76, rec'd.	bah
Nov. 3	Deposition of Linwood Joseph Spain taken on behalf of the Pltfs on 09/21/76, rec'd.	bah
Nov. 3	Deposition of John Wrayburn Tucker taken on behalf of the Plts on 09/21/76, rec'd.	bah
Nov. 3	Deposition of Joseph James Ancell taken on behalf of the Ptlfs on 09.21/76, rec'd.	bah

CONTINUED ON NEXT SHEET

Nov. 3	Deposition of William Hopkins Bryant, Jr., taken on behalf of the Pltfs on 09/22/76, rec'd.	bah
Nov.	Deposition of Robert Landon Talman taken on behalf of the Pltfs on 09/22/76, rec'd.	bah
Nov. 3	Deposition of Joseph A. Savage taken on behalf of the Pltfs on 09/27/76, rec'd.	bah
Nov. 3	Deposition of Raymond Charles Strauss taken on behalf of the Pltfs on 09/22/76, rec'd.	bah
Nov. 3	Deposotion of William Fielding Tulloh taken on behalf of the Pltfs on 09/22/76, rec'd.	bah
Nov.	Deposition of Lawrence Hatcher taken on behalf of the Pltfs on 10/20/76, rec'd.	bah

1977

Jan. 3	Defts' Unions, Second Set of Union Interrogatories to Pltfs', filed	jen
Jan. 12	Pltfs' Motion for Post-Trial Proceedings, filed.	jlm
Jan. 12	Pltfs' Request for Inspection of Deft's Facilities, filed.	jlm
Jan. 12	Pltfs' Motion to Certify the Cause of a Class Action, filed.	jlm

CONTINUED ON NEXT SHEET

Jan. 31	ORDER certifying 2 classes as parties plts under prov. of R.23; granting pltfs' motion for post-trial proceedings; trial on 5-2-77 limited to liability only ent 1-31-77, DDW, filed. Copies mailed.	lg
Jan. 31	Pltfs' Response to Local 182's Second Set of Interrogatories to Pltfs, filed.	apc
Feb. 3	Pltfs' Amended Motion to Certify The Cause as A Class Action, filed.	len
Feb. 9	Deft. American Brands' Response to Pltfs' Amended Motion to Certify Cause as Class Action, filed.	apc
March 1	ORDER vacating order entered 1-31-77; action certified as class action ent 3-1-77, DDW, filed. Copies mailed.	lg
Apr. 15	Deft's American Brands, Inc. Memorandum in Support of Entry of Proposed Consent Decree, filed.	len
Apr. 18	Memorandum in support of entry of proposed consent decree filed by defts. Loc. 182 & Tobacco Wors Intl.	lg
Apr. 18	Pltf's Brief in Support of The Adoption of the Proposed Consent Decree, filed.	len

CONTINUED ON NEXT SHEET

May 05	Deposition of Jack S. Mines taken on behalf of the deft. on 10-21-76, rec'd.	len
May 05	Deposition of John Walter Luck taken on behalf of the deft. on 10-21-76, rec'd.	len
May 05	Deposition of Leon Macon Hatcher taken on behalf of the deft. on 10/21/76, rec'd.	len
05	Deposition of Louis Rudolph Mealy, Jr., taken on behalf of the deft. on 10/21/76, rec'd.	len
May 05	Deposition of Frank Lee Carson taken on behalf of the deft. on 10/21/76, rec'd.	len
May 05	Deposition of Roy C. Sandord, taken on behalf of the pltf. on 11/23/76, rec'd.	len
June 2	COURT MEMORANDUM AND ORDER refusing sketcl. for Consent Decree, ent 6-1-77, DDW, filed. Copies mailed.	jlm
June 24	Pltfs' Notice of Appeal of Order of the District Court issued on 06/01-77, filed.	len

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FRANK L. CARSON
1843 W. Morre Street
Richmond, Virginia

LAWRENCE HATCHER
3836 Grandel Drive
Richmond, Virginia

STUART E. MINES
1603 Hickory Street
Richmond, Virginia

Plaintiffs, : CIVIL ACTION

vs. : NO. 75-0553-R

AMERICAN BRANDS, INC.,
T/A THE AMERICAN TOBACCO COMPANY
Serve: Henry T. Wickham, Esquire
1111 E. Main Street
Richmond, Virginia 23219

LOCAL 182, TOBACCO WORKERS
INTERNATIONAL UNION
Serve: Irving Cosby, Jr.,
Financial Security
Route 2, Box 308
Midlothian, VA

TOBACCO WORKERS INTERNATIONAL UNION
Serve: Rene Rondon, President
1522 "K" Street, N.W.
Washington, D.C. 20005,

Defendants. :

COMPLAINT

2.

INTRODUCTION

1. This action is brought by the plaintiffs on their own behalf and on behalf of the class they represent:

(a) to secure and enforce their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981; and the Fourteenth Amendment to the United States Constitution;

(b) for a declaratory judgment that:

(1) the defendants' employment practices evidence discrimination based on race and color, and

(2) the individual members of the aggrieved class be awarded monetary and other appropriate relief;

(c) for an injunction:

(1) to prohibit the perpetuation of the defendants' discriminatory hiring and employment practices, and

(2) to require the implementation of a viable equal employment opportunity plan;

(d) for back pay, front pay, compensatory and exemplary damages and costs of this suit, including reasonable attorneys' fees.

3.

JURISDICTION

2. This action is authorized by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended; and 42 U.S.C. §1981. Jurisdiction of this Court is also invoked pursuant to 28 U.S.C. §1343(4) and 28 U.S.C. §§2201 and 2202, and the Back Pay Act, 5 U.S.C. §5596.

PARTIES

3. The named plaintiffs in this action are:

(a) Frank L. Carson, a black citizen of the United States and a resident of Richmond, Virginia, employed by the American Tobacco Company, Richmond, Virginia Leaf Department in Richmond, Virginia, and was a member in good standing of Local 182, Tobacco Workers International Union (hereinafter referred to as Local 182) and the Tobacco Workers International Union AFL-CIO (hereinafter referred to as the TWIU) through July of 1974.

(b) Lawrence Hatcher, a black citizen of the United States and a resident of Richmond, Virginia, is a former employee of the American Tobacco Company, Richmond Leaf Department, in Richmond, Virginia.

(c) Stuart E. Mines, a black citizen of the United States and a resident of Richmond, Virginia, is employed by the American Tobacco Company, Richmond Leaf Department, in Richmond, Virginia, and is a member in good standing of Local 182, Tobacco Workers International Union (hereinafter referred to as Local 182) and the Tobacco Workers International Union AFL-CIO (hereinafter referred to as the TWIU).

4. The defendants in this action are:

(a) The American Tobacco Company, located in Richmond, Virginia, (hereinafter referred to as "the Company"). The Company does business in the State of Virginia and the City of Richmond, and is an employer within the meaning of 42 U.S.C. §2000(e)-(b). The Company is engaged in an industry affecting commerce and employs more than one hundred persons.

(b) Local Union 182, Tobacco Workers International Union, AFL-CIO is engaged in an industry affecting commerce, has more than 100 members and exists in whole or in part for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of some of the employees (including the plaintiffs) of the

Company in Richmond, Virginia, and is a labor organization within the meaning of 42 U.S.C. §2000(e)-(d).

(c) The Tobacco Workes International Union AFL-CIO is engaged in an industry affecting commerce, has more than 100 members and exist in whole or in part for the purpose of governing and assisting the Local in its dealings with the Company concerning grievances, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of some of the employees of the Company (including the plaintiffs) in Richmond, Virginia, and is a labor organization within the meaning of 42 U.S.C. §2000(e)-(d).

CLASS ACTION ALLEGATIONS

5. Plaintiffs seek to maintain this action as a class action pursuant to Rules 23(a) and 23(b)(2) of the Federal Rules of Civil Procedure. The class which the plaintiffs represent is composed of all black persons who have sought employment and who are employed or might in the future be employed by the Company's Richmond Leaf Department in Richmond, Virginia, who have been denied, or in the future will be denied equal employment opportunities by defendants on the

grounds of their color and race. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunites, and otherwise adversely affect their status as employees because of color and race. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. Defendants have acted or refused to act on grounds generally applicable to the class.

STATEMENT OF CLAIM

6. The defendants have denied the plaintiffs and the class they represent equal opportunities for hiring, promotion, transfer and on-the-job training and have thus restricted the plaintiffs to the lower paying and less desirable jobs which have traditionally been reserved for black employees of the Company.

7. The defendants have paid white employees of the Company higher wages than many black employees who are doing the same type of work.

8. Matters regarding the promotion and transfer of employees of the Company have been, at all times material to this action, governed and controlled by the collective bargaining agreements negotiated by Local 182, the TWIU and the Company and/or local supplemental agreements. Local 182 and the TWIU have failed in their duty to fairly represent plaintiffs and members of their class and have acquiesced and thus joined in the maintenance of a policy, practice, custom or usage of limiting these persons to the lower-paying and less desirable jobs available in the Company. The collective bargaining agreements entered into between the Company, Local 182, and the International were intended to discriminate on the basis of race and have in fact discriminated against plaintiffs and members of the class they represent because of their race.

9. The defendants have disciplined and/or terminated, or have acquiesced in the discipline and/or termination of members of the class plaintiffs represent solely because of their race.

10. All of the customs, policies, practices and usages herein complained of have existed prior and subsequent to July 2, 1965, and continue to exist at the present time.

THE NAMED PLAINTIFFS

11. The named plaintiffs have been victims of some or all of the discriminatory acts enumerated above.

12. Frank L. Carson was employed by the Company at its Richmond Leaf Department in August of 1972. While employed by the Company, he was denied the opportunity to transfer to the more desirable jobs at other Company facilities in the City of Richmond. Mr. Carson was terminated by the Company in July, 1974, for allegedly smoking on the job, a charge he denied. Mr. Carson requested Local 182 assistance in opposing his termination but was refused such representation.

13. Lawrence Hatcher was employed by the Company in July, 1974. During the period of his employment, he was repeatedly harassed by white supervisors because of his race. In September, 1974, Mr. Hatcher was terminated by the Company after having an argument with a white foreman who had repeatedly harassed him with racial comments.

14. Stuart Mines was employed by the Company at its Richmond Leaf Department in 1970. He has repeatedly requested that he be transferred to the more desirable jobs at other Company facilities in Richmond, Virginia, which have traditionally been

reserved for whites. The Company has refused to grant any of his requests. Mr. Mines has also been denied the opportunity to be promoted to a supervisory position. On many occasions he has been denied union representation because of his race. Mr. Mines has also been denied many of the fringe benefits, such as pension and profit sharing options, afforded other employees of the Company beause of his race.

RELIEF

Plaintiffs and the class they represent have suffered and will continue to suffer irreparable injury by the policies, practices, customs and usages of the defendants complained of herein until the same are enjoined by this Court. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction and declaratory judgment is their only means of securing adequate relief.

WHEREFORE, plaintiffs pray that this Court advance this case on the docket, order a speedy hearing at the earliest practicable date, and upon such hearing, to:

1. Grant plaintiffs and the class they represent a preliminary and permanent injunction enjoining the defendants and their agents, successors, employees, attorneys, and those acting in concert with them and at their direction from continuing to maintain policies, practices, customs or usages of limiting plaintiffs and members of their class to the lower-paying and less desirable jobs, denying them on-the-job training opportunities, denying them the opportunity to advance to supervisory positions, denying them fringe benefits afforded other employees of the Company, and denying them adequate and effective union representation because of their race and color.

2. Establish a mechanism for the enforcement of said injunction, by requiring the defendants to present to the Court within 30 days from the issuance of the injunction, a plan, in form suitable for entry as a decree showing precisely and in detail how it will comply with the Court's order that it cease and desist from the pattern, practices, customs and usages of discrimination against the plaintiffs and members of their class on account of their race and color, as to compensation, terms, conditions and privileges of employment.

3. Enter a declaratory judgment that the policies, practices, customs and usages complained of herein violate, 42 U.S.C. §1981, Title VII, as amended by the Equal Employment Opportunity Act of 1972, the Fourteenth Amendment and the Back Pay Act.

4. Direct that all members of plaintiffs' clss be immediately promoted to the job which they have been denied by reason of discrimination with seniority in such job dating from the first instance of wrongful failure to place in said job.

5. Enter judgment for back pay and compensatory damages in an amount to be fixed upon inquest, and based upon the difference between wages, salaries, allowances and retirement-plan contributions each member of the class would have earned in the absence of illegal discrimination against them.

6. Grant plaintiffs compensatory and exemplary damages against the defendants for violating plaintffs' statutory and constitutional rights to equal employment opportunities.

7. Grant plaintiffs a permanent injunction enjoining the defendants, their agents, successors employees, subordinates, attorneys an those acting in concert with them, from threatening or engaging

in any acts of reprisal, retributions, punishment or harassment against the plaintffs because of their attempts to vindicate their rights and the rights of their class to equal employment opportunity.

8. Retain jurisdiction of this case until the defendants have taken all steps necessary to eliminate the effects of discrimination in the past, to prevent discrimination in the future, to protect the plaintiffs against reprisal, retribution, punishment or harassment and otherwise to comply with this Order.

9. Pay to plaintiffs their costs incurred herein, including reasonable attorneys' fees and expenses, as provided in Title VII, 42 U.S.C. §2000(e) et seq.

10. Grant such other and further relief to the plaintiffs and the class they represent as the Court may consider just and proper.

FRANK L. CARSON, LAWRENCE HATCHER and STUART E. MINES, Plaintiffs

By: /s/ John W. Scott, Jr.
Of counsel

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,	:	
Plaintiffs,	:	CIVIL ACTION No.
v.	:	75-0553-R
AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY	:	
LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION	:	
TOBACCO WORKERS INTERNATIONAL UNION,	:	
Defendants.	:	

ANSWER OF AMERICAN BRANDS, INC.

American Brands, Inc. (hereinafter American) for its Answer states as follows:

1. The plaintiffs' complaint fails to state a claim upon which relief can be granted.

2. American denies that the jurisdiction of this court is properly invoked as set forth in paragraph 2 of the Complaint.

3. American admits that Frank L. Carson and Lawrence Hatcher, who are black, were employed by it at the Richmond Leaf Department in Richmond, Virginia, and that Stuart E. Mines, who is black, is employed at the Richmond Leaf Department in Richmond, Virginia. The remaining allegations of paragraph 3 of the Complaint are denied.

4. American admits the allegations in paragraph 4(a) of the Complaint. American has no knowledge of the facts alleged in subparagraphs (b) and (c) of paragraph 4 and, therefore, denies them.

5. American denies the allegations of fact set forth in paragraph 5 of the Complaint and further denies that this action is properly brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure as stated therein.

6. American denies the allegations of fact set forth in paragraphs, 6, 7, 8, 9, 10 and 11 of the Complaint.

7. American states that Frank L. Carson was employed on July 31, 1972 and that he was terminated in July of 1974. The remaining allegations of paragraph 12 are denied.

8. American admits that Lawrence Hatcher was employed by it in July, 1974 and that he was terminated in September 1974. The remaining allegations of paragraph 13 are denied.

9. American states that Stuart Mines was employed at the Richmond Leaf Department on August 24, 1971. The remaining allegations of paragraph 14 are denied.

WHEREFORE, American requests that the relief prayed for by the plaintiffs be denied, that the Complaint against it be dismissed and that it be awarded its costs incurred in this action, including as a part thereof reasonable attorney's fees.

AMERICAN BRANDS, INC.
T/A THE AMERICAN TOBACCO COMPANY

By: /s/ Henry T. Wickham
Of Counsel

Henry T. Wickham, Esquire
John F. Kay, Jr., Esquire
Kenneth V. Farino, Esquire
Mays, Valentine, Davenport & Moore
23rd Floor - F & M Center
P.O. Box 1122
Richmond, Virginia 23208

Counsel for Defendant, American Brands, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FRANK L. CARSON, et al,
Plaintiffs,

CIVIL ACTION No.
75-0553-R

v.

AMERICAN BRANDS, INC., et al.
Defendants.

==========

ANSWER OF INTERNATIONAL UNION

For its answer to plaintiffs' complaint, Tobacco Workers International Union (hereinafter "TWIU") by counsel admits, denies, alleges and otherwise responds as follows:

1.-2. The allegations in paragraphs 1 and 2 of the complaint do not require an answer. To the extent an answer is required, the said allegations are denied.

3. TWIU's counsel is without sufficient information to form a belief as to the truth of the allegations in paragraph 3 of the complaint, and the said allegations are accordingly denied.

4.(a)-(c) The allegations in paragraphs 4 (a) and 4(b) of the complaint are admitted, except that the allegation in paragraph 4(b) "(including

the plaintiffs)" is denied for reasons stated hereinabove. The allegations in paragraph 4(c) of the complaint concerning commerce and the statute constitute legal conclusions not requiring an answer. To the extent that an answer is required, the said allegations are denied. TWIU does have more than 100 members. The remaining allegations in paragraph 4(c) of the complaint are denied.

5. The allegations in paragraph 5 of the complaint are denied, and it is further denied that this action is properly brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure as stated therein.

6.-11. The allegations in paragraph 6 through 11 of the complaint are denied.

12-14. TWIU's counsel is without sufficient information to form a belief as to the dates of employment and termination of the referenced persons in paragraphs 12 thru 14 of the complaint, and these allegations are accordingly denied. The remaining allegations in these three paragraphs are also denied.

AFFIRMATIVE DEFENSES

1. The plaintiffs complaint fails to properly invoke the jurisdiction of this Court.

2. Plaintiffs have failed to state a claim upon which relief can be granted.

3. Plaintiffs have an adequate and complete remedy at law against the defendant Company.

4. Plaintiffs' claim is barred by limitations and laches.

5. The Secretary of Labor is an indispensable party defendant in this action.

6. The complaint fails to state a claim which can be maintained as a class action under the requirements of Rule 23, Federal Rules of Civil Procedure.

7. The complaint should be dismissed because defendant International has not been served with a proper notice of charge as required by the Civil Rights Act of 1964, as amended.

8. Plaintiffs have failed to exhaust their union administrative remedies, and other remedies provided by law.

9. Defendant International is not a party to any collective bargaining agreements involved, and as to it the complaint should be dismissed.

10. Plaintiffs have failed to exhaust their governmental administrative remedies.

TOBACCO WORKERS' INTERNATIONAL UNION

By: _____
Counsel

Jay J. Levit
Stallard & Levit
2120 Cen. Natl. Bank Bldg.
Richmond, VA 23219
and
James F. Carroll, Esq.
1120 Connecticut Ave. N.W. Suite 940
Washington D.C. 20036

CERTIFICATE

I hereby certify that on December 15, 1975 I mailed a true copy of the foregoing to counsel for the Company, Henry T. Wickham, Esq., 1111 E. Main St., 23rd Floor, Richmond, VA 23219; and counsel for the plaintiffs, John W. Scott, Jr., Esq., 615 Caroline Street, Fredericksburg, VA 23401.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FRANK L. CARSON, et al.
Plaintiffs,

CIVIL ACTION No.
75-0553-F

v.

AMERICAN BRANDS, INC., et al.
Defendants.

==========

ANSWER OF LOCAL UNION NO. 182

For its answer to plaintiffs' complaint, Local Union No. 182 (hereinafter Local 182) by counsel admits, denies, alleges, and otherwise responds as follows:

1.-2. The allegations in paragraphs 1 and 2 of the complaint do not require an answer. To the extent an answer is required, the said allegations are denied.

3. Local 182's counsel is without sufficient information to form a belief as to the truth of the allegations in paragraph 3 of the complaint, and the said allegations are accordingly denied.

4.(a)-(c) The allegations in paragraphs 4(a) and 4(b) of the complaint are admitted, except that the allegation in paragraph 4(b) "(including the plaintiffs)" is denied for reasons stated hereinabove. The allegations in paragraph 4(c) of the complaint constitute legal conclusions not requiring an answer. To the extent that an answer is required, the said allegations are denied.

5. The allegations in paragraph 5 of the complaint are denied, and it is further denied that this action is properly brought as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure as stated therein.

6.-11. The allegations in paragraphs 6 through 11 of the complaint are denied.

12.-14. Local 182's counsel is without sufficient information to form a belief as to the dates of employment and termination of the referenced persons in paragraphs 12 thru 14 of the complaint, and these allegations are accordingly denied. The remaining allegations in these three paragraphs are also denied.

AFFIRMATIVE DEFENSES

1. Plaintiffs have failed to state a claim upon which relief can be granted.

2. Plaintiffs' claim is barred by limitations and laches.

3. The Secretary of Labor is an indispensable party defendant in this action.

4. The complaint fails to state a claim which can be maintained as a class action under the requirements of Rule 23, Federal Rules of Civil Procedure.

5. The complaint should be dismissed because defendant Local Union 182 has not been served with a proper notice of charge as required by the Civil Rights Act of 1964, as amended.

6. Plaintiffs have failed to exhaust their union administrative remedies, their governmental administrative remedies, and other remedies provided by law.

7. The plaintiffs' complaint fails to properly invoke the jurisdiction of this Court.

8. Plaintiffs have an adequate and complete remedy at law against the defendant Company.

TOBACCO WORKERS' INTERNATIONAL UNION

By: _____
Counsel

Jay J. Levit
Stallard & Levit
2120 Cen. Natl. Bank Bldg.
Richmond, VA 23219
and
James F. Carroll, Esq.
1120 Connecticut Ave. N.W. Suite 940
Washington D.C. 20036

CERTIFICATE

I hereby certify that on December 15, 1975 I mailed a true copy of the foregoing to counsel for the Company, Henry T. Wickham, Esq., 1111 E. Main St., 23rd Floor, Richmond, VA 23219; and counsel for the plaintiffs, John W. Scott, Jr., Esq., 615 Caroline Street, Fredericksburg, VA 22401.

Jay J. Levit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

FRANK L. CARSON,	:	
LAWRENCE HATCHER, and	:	
STUART E. MINES,	:	
Plaintiffs,	:	CIVIL ACTION No.
v.	:	75-0553-R
AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY	:	
LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION	:	
TOBACCO WORKERS INTERNATIONAL UNION,	:	
Defendants.	:	

CONSENT DECREE

Plaintiffs brought this class action agaist the above-named defendants under Title VII of the Civil Righs Act of 1964, 42 U.S.C. § 2000(e) et. seq., as amended, 42 U.S.C. § 1981 and the Fourteenth Amendment to the United States Constitution. Jurisdiction is vested in the Court by

virtue of 42 U.S.C. § 2000(e)-5(f) and 28 U.S.C. § 1343(4).

Defendants expressly deny any violation of the Fourteenth Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, as amended, or any other equal employment law, regulation or order. This Decree and Consent hereto does not constitute a finding or admission of any unlawful or discriminatory conduct by defendants.

Plaintiffs' consent to this Decree does not constitute a finding or admission that any of the employment practices of the Richmond Leaf Department of The American Tobacco Company, a division of American Brands, Inc., are lawful.

WHEREAS, plaintiffs and defendants are desirous of resolving all of the issues set forth in the Complaint without the time and expense of further litigation, and the parties have consented to the entry of this Decree, and it appearing to the Court that the entry of this Decree will further the objectives of the aforementioned federal statutes, and that the Decree fully protects the interests of the members of the class represented by plaintiffs, it is

ADJUDGED, ORDERED and DECREED, as follows:

1. GENERAL

Notwithstanding the fact that defendants deny any violation of the aforementioned federal statutes, and solely for the purposes of the settlement of this case and resolving the issues in the Complaint without the additional expense of further litigation, defendants hereby consent that their agents, officers, employees and successors in interest, and all persons in active concert or participation with them are permanently enjoined from discriminating against black employees at the facilities of the Richmond Leaf Department of The American Tobacco Company in Richmond, Virginia.

II. THE CLASS

The class represnted by plaintiffs is as follows:

Class 1. All black persons, whether currently employed or not, who were seasonal employees of The American Tobacco Company's Richmond Leaf Plant at any time on or after 9 September 1972; and

Class 2. All black persons who applied for seasonal employment at The American Tobacco Company's Richmond Leaf Plant at any time on or after 9 September 1972.

III. INJUNCTIVE RELIEF FOR THE CLASS

In full and final settlement of any and all claims for injunctive relief alleged in the Complaint, the parties agree to the following:

1. For the purposes of determining eligibility for vacations and for promotions, demotions, lay-offs and recalls, every current and future regular hourly paid production employee of the Richmond Leaf Department will be credited with actual time worked as a seasonal employee commencing with the date of hire of the last period of continuous employment as a seasonal employee in accordance with Section I of Article 7 of the current collective bargaining agreement governing seasonal employees. The combined total of such seasonal and regular employment will apply toward service requirements for vacations, and for promotions, demotions, lay-offs and recalls.

2. Regular employees who have served the probationary period as a seasonal employee during the last period of his or her continuous seasonal employment at Leaf prior to being transferred to regular Leaf employment will become eligible for medical benefits and sick benefits immediately upon such transfer to regular employment.

3 In the event that vacancies in hourly paid permanent production job classifications at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

4 In the event that vacancies in the job classification, Watchman, at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

5 The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equal 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

IV. THE MONETARY CLAIMS OF THE CLASS

The Court finds from the evidence previously filed in the form of answers to interrogatories that there are no discriminatory hiring practices

at the Richmond Leaf Department. Accordingly, the Court holds that members of Class 2, as hereinabove defined, are not entitled to assert claims for monetary relief.

Claims for monetary relief may be asserted by indivdual members of Class 1, as hereinabove defined, by filing with the Clerk of this Court a proof-of-claim signed by the individual asserting such claim. The information required to be submitted on the proof-of-claim form and the time of filing same shall be determined by subsequent order of the Court.

Each member of Class 1 asserting a claim must prove that he or she was denied the opportunity to become a regular hourly paid production employee at the Richmond Leaf Department because of racially discriminatory acts, practices or policies of defendants and that he or she suffered economic harm as a consequence thereof.

Defendants may assert any and every defense to such claims that may have been available to them prior to the entry of this Decree. Defendants also expressly reserve the right to assert as a defense that no member of the class who was not or had not been an employee of the Richmond Leaf Department within the 120 day period prior to September 9, 1974 is entitled to monetary relief.

The Court shall determine by subsequent order the procedure for determining the entitlement of each member of the class to back pay and other monetary relief.

V. EXCLUSIVE REMEDY

It is agreed that this Decree embodies the exclusive remedy for any and all claims of alleged discriminatory employment practices based upon race of the plaintiffs and the members of the class, heretofore defined, as alleged in the Complaint against defendants occurring at any time before this Decree becomes final, and that no other actions will be brought to such persons against defendants with respect to such claims in any forum, administrative or judicial.

VI. NOTICE OF PROPOSED CONSENT DECREE

The Richmond Leaf Department shall give notice to all members of Class 1, as hereinabove defined, by posting in a conspicuous place on the bulletin boards of its plant a copy of the proposed Consent Decree. The Decree shall remain posted until it becomes final. In addition,

within 30 days after the proposed consent Decree is filed, the Richmond Leaf Department shall transmit by first-class mail to each Class 1 member a notice explaining the proposed Consent Decree and a class member's rights under it. The notice, which shall be subject to review by counsel for the plaintiffs prior to being mailed, shall include a copy of the proposed Consent Decree. The notice shall explain that any class member who objects to the proposed Decree must do so in writing within thirty-five (35) days of the postmark of the letter. These written objections must be mailed to:

Clerk
United States District Court
Eastern District of Virginia
Richmond Division
United States Court House
Tenth and Main Streets
Richmond, Virginia 23219

Re: Carson v. American Brands, Inc. et al.
Civil Action No. 75-0553-R.

VII. REPORTS

Within twelve months after this Consent Decree becomes final and within thirty days of each anniversary date of the entry of the final decree, for a period of three years, the Richmond

Leaf Department shall file with the Clerk of this Court the total number of production supervisory positions of Foreman and Assistant Foreman and the percentage of black employees in such positions. When the percentage of blacks in such positions equals one-third of the total of such positions, the Richmond Leaf Department shall be required to make no further reports.

VIII. ATTORNEY'S FEES AND COSTS

Counsel for the plaintiffs are hereby awarded reasonable attorney's fees and costs to be paid by the defendants, jointly and severally, within ten days after this Consent Decree becomes final. Counsel shall confer prior to that time to determine the amount of said fees and costs. Counsel for the plaintiffs shall also be entitled to reasonable attorney's fees and costs in connection with carrying out the injunctive provisions of this decree. Entitlement to and amount of attorney's fees and costs in connection with any award of monetary relief to class members shall be determined by subsequent order of this Court.

10.

The Court will decide, at a later date, whether each defendant will be required to pay a specific portion of the attorney's fees and costs awarded, and if so, the amount of the award allocable to each defendant.

ENTER: //

_____
United States District Judge

Agreed:

/s/ John W. Scott, Jr. (signature)
Attorney for Plaintiffs

/s/ Henry T. Wickham (signature)
Attorney for Defendant Company

/s/ Jay J. Levit (signature)
Attorney for Defendant Unions

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al.,	:	
Plaintiffs,	:	CIVIL ACTION No.
v.	:	75-0553-R
AMERICAN BRANDS, INC., et al.,	:	
	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF ENTRY OF PROPOSED CONSENT DECREE

Plaintiffs filed this action against the defendants on October 24, 1975, alleging that their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the Fourteenth Amendment to the United States Constitution had been violated. In the complaint, the plaintiffs sought declaratory, injunctive and monetary relief

and requested that the case proceed as a class action. The case was certified as a class action by court order dated march 1, 1977.

The parties have participated in extensive discovery which was followed by negotiations in an attempt to settle the issues raised by the complaint. These negotiations culminated in a proposed Consent Decree which the parties requested the Court to enter at the final pre-trial conference on April 1, 1977. At that conference the court expressed concern that the parties were no longer in an adversary posture and that certain provisions of the Consent Decree might violate the United States Constitution. The court requested the parties to submit memoranda covering these questions.

Rule 23

Section VI of the proposed Consent Decree requires the defendant Company to provide notice to all members of Class 1 by posting a copy of the proposed Decree on all the bulletin boards of the Richmond Leaf Plant. Additionally, the proposed Consent Decree and an explanatory notice will be mailed to all class members. The notice requirements of Rule 23(e) of the Federal Rules of

Civil Procedure will be satisfied by compliance with Section VI. Also, since any member of the class may object to the entry of the proposed Decree as a final order by filing a written objection with the Clerk, the proposed Decree provides assurance that this case will remain an adversary proceeding.

It should be noted, also, that the entry of this Consent Decree after notice to class members will have no greater or lesser effect on those who are not members of the class than it would were the Decree a final one entered after complete trial of the case by the Court since Rule 23 does not contemplate notice to anyone other than members of the class represented by the named plaintiffs.

Section IV of Proposed Consent Decree

The answers of defendant Company to interrogatories propounded by plaintiffs show conclusively, and plaintiffs so concede, that there are no discriminatory hiring practices at the Richmond Leaf Department. (Answers to interrogatories 14, 15, 41-52 and 57.) For example, by year, the percentage of new hires which were black are as follows: 1971 - 98.9%; 1972 - 98%; 1973 - 99%;

1974 - 97%; 1975 - 91.7%; 1976 - 100%. By year, the percentage of black applicants who were hired are as follows: 1971 - 90.1%; 1972 - 82.2%; 1973 - 99&; 1974 - 90.1%; 1975 - 28.6%; 1976 - 10.4%.

Section III of Proposed Consent Decree

Paragraph 1 of Section III provides that seasonal employees who become regular employees will be credited with actual time worked as a seasonal employee in determining their individual employee seniority date. This provision of course, will apply to all employees of the defendant at the Richmond Leaf Plant without regard to race.

Paragraph 2 will allow employees who successfully transfer from seasonal to regular employment to be eligible for medical benefits and sick benefits immediately upon such transfer if they have fully served a 44-working day probationary period during their seasonal employment. Again, this provision will apply to all Leaf employees regardless of race.

Paragraph 3 is a restatement of a practice which has been generally followed at the defendant Company for many years. Under present practice, vacancies in regular production job classifica-

tions are posted for seven working days. The most senior regular employee who signs the posting is given the first opportunity to qualify for the vacancy. If no regular employee signs the posting, management then canvasses the seasonal employees from senior to junior until it finds an employee who is interested in qualifying for the vacancy.

There is sound business reasoning behind this practice. Many of the jobs held by regular employees are similar or identical to jobs held by seasonal employees. Also, seasonal employees become familiar with premanent job classifications by working in close proximity to such jobs held by regular employees. This being the case, seasonal employees provide the Company with a ready pool of experienced employees who are better qualified to fill vacancies in regular employment than would be outside hire. Finally, it is fair and equitable to allow qualified seasonal employees the initial opportunity to transfer to regular job vacancies.

Paragraph 4 is redundent of Paragraph 3 inasmuch as the job classification of Watchman is considered an hourly paid permanent production job. The practice of defendant Company is and has been however, to canvass only the most

senior seasonal employees for interest in filling a permanent vacancy in the job of Watchman when no regular employee signs a posting for such vacancy. If none of the emplyees canvassed is interested, it has been the practice to fill the vacancy with an outside hire. This practice of canvassing only the most senior seasonal employees for interest in a permanent vacancy in the job of Watchman is supported by the real need to fill such vacancies with individuals who want to be watchmen. As of March 1, 1977, the inventory of stored tobacco at defendant Company was 138,583,770 pounds having a value of $214,113,265. The experience has been that seasonal and regular employees have been reluctant to take this job on a permanent basis because of the night, weekend and holiday work which is required. Also, the Company wants to avoid the problem of very junior seasonal employees taking the job for this limited purpose of obtaining regular employment from which he or she can bid on vacancies in permanent production job classifications, thus, in effect, by-passing all the more senior seasonal employees. However, for purposes of settling this lawsuit, the defendant Company has agreed to discontinue this practice.

Paragraph 5 establishes a goal for the filling of vacancies in production supervisory positions of Foreman and Assistant Foreman, the date for the accomplishment of which is December 31, 1980. Since 1959, eight blacks have been hired or promoted into such jobs and four of these were employees who were promoted from hourly paid production jobs. These four blacks have been the only hourly paid production employees so promoted since 1959. Also, since July 2, 1965, over 58% (7 of 12) of all vacancies in the positions of Foreman and Assistant Foreman have been filled by blacks. The total number of Foreman and Asssitant Foreman positions has been reduced 50% since July 2, 1965, yet the percentage of blacks in those jobs has increased from 2.4% to 28.6% during this period. The goal in Paragraph 5 is to further increase the number of blacks in these positions until they comprise one-third of the total.

This goal is very similar to self-imposed goals assumed by the Richmond Leaf Plant in its current affirmative action program. Since the defendant Company is a government contractor, such affirmative action programs have been required by Executive Order 11246 since its promulgation in 1965. In its 1977 program, the Richmond Leaf Plant is committed to making every effort to

recruit qualified minority individuals to fil any vacancies which may occur in the EEO job classification of officials and Managers. Thus, Paragraph 5 is largely comulative of requirements imposed by this executive order.

Respectfully submitted,

AMERICAN BRANDS, INC.

By /s/ Henry T. Wickham
Of Counsel

Henry T. Wickham
D. Eugene Webb, Jr.
Mays, Valentine, Davenport & Moore
23rd Floor, F&M Center
1111 East Main Street
Post Office Box 1122
Richmond, Virginia 23208

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al.
Plaintiffs,

CIVIL ACTION No.
75-0553-R

v.

AMERICAN BRANDS, INC., et al.
Defendants.

==========

MEMORANDUM IN SUPPORT OF
ENTRY OF PROPOSED CONSENT DECREE

The Unions urge the Court to enter the proposed consent decree, having reviewed the memorandum in support thereof submitted by the Company, and having nothing substantial to add thereto. Of course, with respect to Article III, 5, the position of the Unions is that filling of supervisory positions is a management function.

TOBACCO WORKERS UNION LOCAL NO. 182
and TOBACCO WORKERS INTERNATIONAL UNION

By: /s/ Jay J. Levit
Counsel

Jay J Levit
STALLARD & LEVIT
2120 Cen. Natl. Bank Bldg.
Richmond, VA 23219

CERTIFICATE

I hereby certify that on April 15, 1977, I mailed a true copy of the foreging to Henry T. Wickham, Esq., 23rd Floor, F&M Center, 1111 East Main Street, P.O. Box 1122, Richmond, VA 23208 and to John W. Scott, Esq., Hill, Tucker & Marsh, 615 Caroline Street, Fredericksburg, VA 22401.

/s/ Jay J. Levit

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al.
Plaintiffs,

CIVIL ACTION No.
75-0553-R

v.

AMERICAN BRANDS, INC., et al.
Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF THE ADOPTION OF THE PROPOSED CONSENT DECREE

Pursuant to the Court's request of April 1, 1977, plaintiffs, Frank L. Carson, et al., by counsel, hereby respectfully submit their brief in support of the adoption of the consent decree which has been endorsed by all parties in the case at bar.

I

STATEMENT OF THE FACTS

The defendant, American Brands, Inc. (hereinafter referred to as the "Company"), operates the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia, for the purpose of processing and storing leaf tobacco. The defendant Local 182 Tobacco Workers International Union has exclusive bargaining rights for the establishment of wage rates and other terms and conditions of employment for all hourly paid production unit positions at the Richmond Leaf Department. The defendant Tobacco Workers International Union is a national organization consisting of local unions, incuding Local 182.

The plaintiffs are present and former black seasonal employees at the Richmond Leaf Department and held jobs under the jurisdiction of Local 182 TWIU during their employment. As seasonal employees, the plaintiffs all worked at the Richmond Leaf Plant an average of six months each year. Regular employees worked at this same facility all year.

The Company employs approximately 150 seasonal employees, all of whom at the present time are black, and approximately 100 regular employees, of whom 348 are white. Plaintiffs are not aware of any white individuals who have ever been classified as seasonal employees at the Company's Richmond Leaf Plant.

Prior to September 1963, the regular job classifications of Truck Driver, Watchman, Maintenance Storage, and Boiler Operator at the Leaf Plant were reserved for whites only. As of February 15, 1976, sixteen persons were employed as Watchmen, one of whom was black.

Regular employees have the right to obtain any permanent position for which the TWIU has bargaining rights within the Richmond Leaf Department. Seasonal employees have the right to obtain any seasonal position for which the TWIU has bargaining rights within the Richmond Leaf Plant. Seasonal employees may transfer to regular classifications only when no regular employee desires that position. Should the seasonal employee transfer to a regular position he looses all of his seniority and is treated as a new hire for seniority purposes. Separate seniority rosters are maintained for regular and seasonal emplyees.

When a seasonal employee transfers to a regular position, he is placed at the bottom of the regular seniority roster irrespective of the number of years he has worked as a seasonal employee with the Company. This loss of seniority affects his status for promotions, demotions, lay-offs, recalls and vacations, or in short, the principal terms and conditions of his employment.

Since 1971, the vast majority of applicants and new hires at all of the Company's locations in the Richmond area have been black, as indicated by the following chart:

YEAR	APPLICANTS		NEW HIRES	
	BLACKS	WHITES	BLACKS	WHITES
1971	97	1	88	1
1972	118	5	97	2
1973	94	4	93	1
1974	71	7	64	2
1975	77	3	22	2

The racial composition of the production unit at the Richmond Leaf Department is as follows:

YEAR	REGULAR EMPLOYEES		SEASONAL EMPLOYEES	
	WHITES	BLACKS	WHITES	BLACKS
1968	41	52	--	116
1970	40	59	--	175
1973	40	56	--	176
1976	37	57	--	135

Of the 35 supervisory positions at the Company's Richmond Leaf Department as of April 5, 1976, seven, or 20%, were filled by blacks. Of the 229 persons in hourly paid production unit jobs at the Richmond Leaf Department in that same year, 192, or 84% were black.

II

ARGUMENT

A. The Provisions of Paragraphs III, 1 and 3 of the Proposed Consent Decree Should Be Adopted In Order To Equitably Restructure The Seniority System Of The Richmond Leaf Department.

Paragraph III, 1 of the Proposed Consent Decree states:

> 1. For the purposes of determining eligibility for vacations and for promotions, demotions, lay-offs and recalls, every current and future regular hourly paid production employee of the Richmond Leaf Department will be credited with actual time worked as a seasonal emplyee commencing with the date of hire of the last period of continuous employment as a seasonal

> employee in accordance with Section I of Article 7 of the current collective bargaining agreement governing seasonal employees. The combined total of such seasonal and regular employment will apply toward service requirements for vacations, and for promotions, demotions, lay-offs and recalls.

This provision would allow all persons who were employed as seasonal workers at the Richmond Leaf Plant to be credited with seniority for "actual time" worked at the plant from the beginning of their employment. This is exactly the same relief ordered by the United States Court of Appeals for the Fourth Circuit in the case of Russell v. American Tabacco Company, 528 F.2d 357, 364 (1975), when the Court ordered that seasonal employees shall be allowed to transfer to regular employment positions with each employee's departmental seniority "computed from his employment seniority date."

The provisions of Paragraph III,1 would also eradicate any vestiges of the effects of past racial discrimination since black seasonal employees would now be permitted to transfer to permanent positions without forfeiting their seniority. As the Fourth Circuit has repeatedly held:

> "Intentional segregation of the past that is perpetuated by a company's seniority system precludes the company from claiming that its system is bona fide within the meaning of § 2000e-2(h)." Russell v. American Tobacco Company, 528 F.2d 357, 363 (4th Cir. 1975); see also United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Griggs v. Duke Power Co., 420 F.2d 1225, 1236 (4th Cir. 1970).

The parties have attempted to alter the present departmental seniority system at the Richmond Leaf Department to equitably allow all persons to be credited with time served at the plant. Even though the Company will retain its regular and departmental seniority rosters, the new system will satisfy the provisions of 42 U.S.C. § 2000e et seq. by removing the inequities that presently exist in that system.

The provisions of Paragraph III, 3 of the proposed Consent Decree state:

> 3. In the event that vacancies in hourly paid permanent production job classifications at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

This will allow seasonal employees to transfer to full time positions, some of which were at one time reserved for whites only, as vacancies occur. This relief again is the same type of remedy fashioned by the Fourth Circuit in Russell v. American Tobacco Company, 528 F.2d 357, 362-363 (1975). By permitting seasonal employees to transfer, as vacancies occur, to regular classifications not filled by current regular employees, the seasonal employees are permitted to obtain full-time employment, thereby allowing present employees of the company the opportunity to advance before there is outside hiring.

B. The Provisions Of Paragraph III 2 and 4 of The Proposed Consent Decree Should Be Adopted In Order To Fully Clarify The Provisions of Paragraphs III, 1 and 3.

Under the present seniority system at the Richmond Leaf Plant, all new regular employees must serve a probationary period prior to becoming eligible for health benefits. The proposed Consent Decree would allow all seasonal employees who have already served this probationary period to transfer into regular employment without having to serve an addition probationary period. There is no reason to again subject these employ-

ees to a probationary period with the attendant loss of medical insurance coverage. The Company proposed this provision for the purpose of removing all impediments to seasonal employee transfer and, as with the entire decree, all parties agreed.

The provisions of Paragraph III, 4 of the proposed Consent Decree parallel the provisions of Paragraph III, 1, and should be adopted for reasons previously stated herein. This paragraph was specifically included, however, because of the unique procedure used by the Company to fill vacancies in the "Watchman" classification, whereby a separate "eligibility list" is used to fill such positions prior to hiring from the "outside". This provision will negate any possible question as to whether the procedure used in filling "Watchmen" positions has been affected by the consent decree.

C. The Provisions Of Paragraph III, 5 Of The Proposed Consent Decree Will Assure That The Company Will Attempt And Fill Supervisory Positions At The Richmond Leaf Department With A Representative Number of Qualified Blacks

Paragraph III, 5 of the proposed Consent Decree states:

5. The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

Such a provision merely establishes a "goal" for the Company to obtain in filling its supervisory work force. It does not establish a quota or demand that the Company employ persons who are less qualified than other applicants to fill a vacancy. This provision merely amends the Company's affirmative action plan to provide that the Company recognizes a need to employ qualified blacks in supervisory positions in meaningful numbers. The Richmond Leaf Plant employs a substantial number of blacks in blue collar positions. The use of qualified black persons as supervisors simply removes the stigma of decades of alleged inferiority that for so long relegated blacks to the position of "worker" but never "leader".

By adopting this goal, the Company is simply affirming that it will hire and promote all

qualified persons, including blacks, to supervisory positions irrespective of race, and will attempt to place blacks into such positions in large numbers as it has done in hiring blacks as hourly production workers.

III

SUMMARY

The proposed Consent Decree has been presented to the Court by all the parties as a fair, equitable and just resolution of the initial phase of this litigation. In recent years, the vast majority of applicants for positions at the Richmond Leaf Department have been black. Consequently, the racial composition of the hourly workforce has become majority black. Plaintiffs have not found any evidence of discriminatory hiring for positions in the hourly production unit. Plaintiffs contend, however, that the proposed Consent Decree will alleviate the present effects of past racial discrimination by establishing a fair and equitable seniority system at the Richmond Leaf Department that will permit all hourly production workers to advance as far as

their abilities will permit, while giving them credit for time served in the employ of the Company. The mandate of Title VII of the Civil Rights Act of 1964 will be satisfied by the adoption of the provisions of the Consent Decree as proposed by all the parties to this litigation, in that the terms and conditions of employment at the Richmond Leaf Plant will operate fairly and equitably for all its employees.

WHEREFORE, plaintiffs respectfully urge the Court to enter the Consent Decree submitted herein

FRANK L. CARSON, et al., Plaintiffs

By: /s/_____
Of Counsel

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
HILL, TUCKER & MARSH
214 East Clay Street
P.O. Box 27363
Richmond, VA 23261

JOHN W. SCOTT, JR.
HILL, TUCKER & MARSH
615 Caroline Street
Fredericksburg, VA 22401

JACK GREENBERG
BARRY L. GOLDSTEIN
10 Columbus Circle
Suite 2030
New York, New York 10019

Counsel for Plaintiffs

CERTIFICATE

I hereby certify that a copy of the foregoing Breif was mailed, postage prepaid, to Henry T. Wickham, Esquire, Mays, Valentine, Davenport & Moore, Post Office Box 1122, Richmond, VA 23208; and to Jay J. Levit, Esquire, 1223 Central National Bank Building, Richmond, VA 23219, as counsel of record, this 18th day of April, 1977.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al.
Plaintiffs,

CIVIL ACTION No.
75-0553-R

v.

AMERICAN BRANDS, INC., et al.
Defendants.

==========

NOTICE OF APPEAL

Notice is hereby given that the plaintiffs, Frank L. Carson, et al., by counsel, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the June 1, 1977, Order of the District Court refusing to enter a proposed Consent Decree and denying injunctive relief.

FRANK L. CARSON, et al
Plaintiffs

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
HILL, TUCKER & MARSH
214 East Clay Street
P.O. Box 27363
Richmond, VA 23261

JOHN W. SCOTT, JR.
HILL, TUCKER & MARSH
615 Caroline Street
Fredericksburg, VA 22401

JACK GREENBERG
BARRY L. GOLDSTEIN
10 Columbus Circle
Suite 2030
New York, New York 10019

Counsel for Plaintiffs

MAYS, VALENTINE, DAVENPORT & MOORE
F & M Center P.O. Box 1122
Richmond, Virginia 23208
Telephone (804)644-6011

Washington, D.C. Office
Barr Building
910 Seventeenth St.
N.W.20006
Telephone (202)296-4222

January 10, 1978

Mr. William K. Slate, II
Clerk
United States Court of Appeals
For the Fourth Circuit
U.S. Court House
Tenth and Main Streets
Richmond, Virginia 23219

Re: Carson, et al v. American Brands, Inc., et al -No. 77-2260

Dear Mr. Slate:

On June 24, 1977, the plaintiffs in a Title VII action styled Carson, et al v. American Brands, Inc., et al, C.A. No. 75-0553-R, pending in the United States District Court for the Eastern District of Virginia, Richmond Division, filed a Notice of Appeal from an order of the District Court entered on June 1, 1977, refusing to enter a consent decree presented it by all parties to the action.

The defendants in the District Court, American Brands, Inc., t/a The American Tobacco Company, Local 182, T.W.I.U. and Tobacco Workers

International Union, did not take an appeal from the District Court's order and now take no position as to the merits of this appeal. Accordingly, no brief will be submitted by them unless, of course, the Court of Appeals should otherwise direct.

Moreover, inasmuch as the District Court's order was a refusal to enter a consent decree, the defendants are not, in fact or in law, appellees. Accordingly, this appeal would not appear to fulfill the "case or controversy" mandate of Article III, Section 2 of the United States Constitution. See, also, Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S.47 (1971).

Counsel for the defendant Unions have requested American to state that they concur with the statements contained herein and likewise take no position as to the merits of the appeal.

Respectfully submitted

/s/ Henry T. Wickham
Henry T. Wickham
Counsel for American Brands, Inc.

29/312
cc: Jay J. Levit, Esquire
P. Peter Sherwood, Esquire
Henry L. Marsh, III, Esquire
John W. Scott, Jr., Esquire

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 77-2260

Filed
JAN 31 1978
WILLIAM K. SLATE, II
CLERK

Frank L. Carson, Lawrence Hatcher,
Stuart E. Mines,

Appellants,

versus

American Brands, Inc., t/a The American Tobacco Company; Local 182, Tobacco Workers International; Tobacco Workers International Union,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Upon consideration of the appellant's motion for summary reversal and the appellee's response to the motion, by counsel,

IT IS ORDERED that the motion for summary reversal is denied.

FOR THE COURT - BY DIRECTION

/s/ William K. Slate, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 77-2260

Filed MAR 27 1978
U.S. Court of Appeals
Fourth Circuit

Frank L. Carson, Lawrence Hatcher,
Stuart E. Mines,

Appellants,

v.

American Brands, Inc., t/a The American Tobacco Company; Local 182, Tobacco Workers International; Tobacco Workers International Union,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

O R D E R

The appellants' motion for summary reversal having been read and considered, and it being the view of the panel that the appeal presents questions of law and of fact on which oral argument should be heard,

IT IS, with the concurrence of Chief Judge Haynsworth and Judge Winter, ORDERED that the appellants' motion for summary reversal is hereby denied. The suggestion of American Brands, Inc. that the appeal should be dismissed is also denied.

The Clerk is directed to establish an appropriate briefing schedule inviting appellees to file a brief addressing the merits of the appeal and allowing appellants an opportunity to reply.

/s/_____.
United States Circuit Judge

/s/ Emily Rueger

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 77-2260

Filed
MAR 28 1978
WILLIAM K. SLATE, II
CLERK

Frank L. Carson, Lawrence Hatcher,
Stuart E. Mines,

Appellants,

versus

American Brands, Inc., t/a The American Tobacco Company; Local 182, Tobacco Workers International; Tobacco Workers International Union,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

For reasons appearing to the Court,

IT IS ORDERED THAT:,

1. twenty-five copies of the appellees' brief shall be filed on or before April 27, 1978;

2. the appellants' reply brief, if any, shall be filed 14 days after service of the appellees' brief;

FOR THE COURT - BY DIRECTION

/s/ William K. Slate, II .
CLERK

William K. Slate, II, Clerk
By Emily Rueger

UNITED STATES COURT OF APPEALS
Fourth Circuit
January 25, 1978

Telephone 782-2213
Area Code 804
Clerk
Tenth and Main Streets
Richmond, Virginia 23219

O. Peter Sherwood, Esq.
10 Columbus Circle,
Suite 2030
New York, NY 10019

Jay J. Levit, Esq.
Suite 2120
Central National
Bank Bldg.
Richmond, VA 23219

Henry L. Marsh, III, Esq.
William H. Bass, Esq.
Randall G. Johnson, Esq.
P.O. Box 27363
Richmond, VA 23261

Henry T. Wickham,
D. Eugene Webb, Esq.
P.O. Box 1122
Richmond, VA 23208

John W. Scott, Jr., Esq.
615 Caroline Street
Fredericksburg, VA 22401

Re: 77-2260, Frank L. Carson, et al vs.
American Brands, Inc., etc., et al

Dear Counsel:

I am writing to you at the request of the panel to call your attention to the recent decision of Seigal v. Merrick, ___F.2d___ 47 L.W. 2418 (2 Cir., Dec. 14, 1978), a copy of which I enclose. As a result of reading this case, the panel is concerned as to whether it has jurisdiction to entertain this appeal and the panel desires the views of counsel on this question.

Accordingly, you are requested to file a supplemental memorandum on this question by February 9, 1979. Your memoranda should be

filed simultaneously and each of you will have the opportunity to respond to the views of your adversary by February 16, 1979. Please file all of the memoranda with me so that I may forward them to the panel.

Very truly yours,

WILLIAM K. SLATE, II

By Carol R. Lemon
(Mr.) Carol R. Lemon
Chief Deputy Clerk

CRL:ecr

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 75-0553-R
AMERICAN BRANDS, INC., et al.,	)	
	)	
Defendants.	)	

MOTION

The defendants American Brands, Inc., Local 182, Tobacco Workers International Union, and Tobacco Workers International Union, by their respective counsel, move the Court for an order establishing a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure directing the attorneys for the parties to appear to establish a trial date and to consider such other matters as may aid in the disposition of this action. In support of this motion the defendants assert that they do not now consent to the entry of the proposed Decree which was presented to the Court by the parties at the final pre-trial conference on April 1, 1977, and that the case is once again before this Court, the appeal by plaintiffs having been dismissed by

the Court of Appeals for the Fourth Circuit on September 14, 1979, and the mandate having issued on October 5, 1979.

AMERICAN BRANDS, INC.

By Henry T. Wickham
Of Counsel

Henry T. Wickham
D. Eugene Webb, Jr.
Mays, Valentine, Davenport & Moore
23rd Floor, F&M Center
Post Office Box 1122
Richmond, Virginia 23208

LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION and TOBACCO WORKERS INTERNATIONAL UNION

By Jay J. Levit
Of Counsel

Jay J. Levit
Imperial Building
Third Floor
5th and Franklin Streets
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was mailed to Henry L. Marsh, III, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, P.O. Box 27363, Richmond, Virginia 23261, this 10 day of October, 1979

/s/ Henry T. Wickham

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
In the Chambers of Judge Warriner

FRANK L. CARSON, et al.,

v.

CIVIL ACTION
NO. 75-0553-R

AMERICAN BRANDS, INC., et al.,

TO: John W. Scott, Jr., Esquire
615 Caroline Street
Fredericksburg, Virginia 22401

Randy Johnson, Esquire
214 East Clay Street
Richmond, Virginia 23219

Henry T. Wickham, Esquire
P.O. Box 1122
Richmond, Virginia 23208

Jay J. Levit, Esquire
3rd Floor, Imperial Building
5th & Franklin Streets
Richmond, Virginia 23219

NOTICE OF PRE-TRIAL CONFERENCE

Please be advised that the above-styled civil action has been placed on Judge Warriner's docket for trial. Judge Warriner has requested an initial pre-trial conference for November 15, 1979 at 11:30 a.m. It is anticipated that the conference will last approximately fifteen (15) minutes.

At this conference the Court will set dates for the completion of discovery, briefing schedules, dates for status conferences if any appear advantageous, a date for the final pre-trial conference and a trial date.

It is not necessary for the lawyer who expects to try the case to attend this initial pre-trial conference, but the lawyer who does attend should be familiar with the case and should have with him all available dates.

W. FARLEY POWERS, JR., Clerk

By: /s/ Linda K. McDonald
Deputy Clerk
Linda K. McDonald

Date: November 2, 1979

IF THIS CASE IS SETTLED PRIOR TO THE CONFERENCE, PLEASE CALL CLERK'S OFFICE, 782-2611. THANK YOU.

Supreme Court, U. S.
FILED
MAR 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

V.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Henry T. Wickham
D. Eugene Webb, Jr.
Mays, Valentine, Davenport & Moore
23rd Floor
F&M Center
P. O. Box 1122
Richmond, VA 23208

Jay J. Levit
422 E. Franklin St.
Imperial Building
3rd Floor
Richmond, VA 23219

James F. Carroll
Air Rights Building
7315 Wisconsin Ave.,N.W.
Washington, D.C. 20014

Counsel for Respondents

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

SUBJECT INDEX

	Page
INDEX OF AUTHORITIES.....	(iii)
QUESTION PRESENTED.....	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	4
CERTIORARI SHOULD NOT BE GRANTED.....	4
I. This Action Does Not Present a "Case or Controversy" Within the Meaning of Article III of the United States Constitution.....	4
II. There is No Conflict Among the Courts of Appeal on the Issue Presented by the Petition.....	11
III. The District Court's Order Refusing to Enter a Consent Decree is not Appealable Under 28 U.S.C. § 1292(a)(1).....	13
IV. The Collateral Order Doctrine Does Not Apply in This Case.....	20

Page

CONCLUSION..... 24

CERTIFICATE..... 26

APPENDIX..... 27
Motion of Defendants
Served October 10, 1979

INDEX OF AUTHORITIES

Page

Cases

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)..... 3

Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955)..... 15

California Brewers Association v. Bryant, 48 U.S.L.W. 4156 (February 19, 1980)..... 8,9

Carson v. American Brands, Inc., 606 F.2d 420, 421..... 2

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)..... 12,21, 22

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)..... 22

Ex Parte Baez, 177 U.S. 378 (1900)..... 10

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)..... 10

Page

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 438 (1978)..... 14,15

International Brotherhood of Teamsters v. United States, 431 U.S. 324 . 8,9

Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971)..... 5

Norman v. McKee, 431, F.2d 769 (9th Cir. 1970), cert. denied 401 U.S. 912 (1971)..... 11

Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978)..... 11,12, 23

Tacon v. Arizona, 410 U.S. 351 (1973)..... 3,13

United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975)..... 10

Page

U. S. CONSTITUTION

Article III, § 2..... 5

Statutes

28 U.S.C. § 1291..... 3,21
28 U.S.C. § 1292(a)(1).... passim
42 U.S.C. § 1981..... 2
42 U.S.C. §§ 2000e,
et seq..... 2

IN THE

SUPPEME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a
THE AMERICAN TOBACCO COMPANY
LOCAL 182, TOBACCO WORKERS
INTERNATIONAL UNION, and
TOBACCO WORKERS INTERNATIONAL
UNION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Notwithstanding the statement of petitioners of the questions presented (Petitioners' Brief at 6, 7), the Court of Appeals for the Fourth Circuit rendered its decision in this case only on the question of whether an order refusing to enter a consent decree proposed by the parties to litigation brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, et seq., and 42 U.S.C. § 1981 is appealable under 28 U.S.C. § 1292(a)(1). Carson v. American Brands, Inc., 606 F.2d 420, 421.

The issues raised now by petitioners relating to the appealability of the order of the District Court under the "collateral order"

exception to 28 U.S.C. § 1291 and concerning the alleged abuse of discretion by the District Court were not decided by the Court of Appeals. They should not now be considered by this Court. Tacon v. Arizona, 410 U.S. 351 (1973); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

STATEMENT OF THE CASE

Solely for the purpose of this Brief in Opposition, respondents accept the Statement of the Case presented in petitioners' brief with the exception noted above that the Court of Appeals did not decide the appealability of the District Court's order under the "collateral order" exception to 28 U.S.C. § 1291.

ARGUMENT

CERTIORARI SHOULD NOT BE GRANTED

I. This Action Does Not Present a "Case or Controversy" Within The Meaning of Article III of The United States Constitution

The District Court order from which the petitioners sought an appeal to the Court of Appeals for the Fourth Circuit is an order refusing to enter a consent decree which was presented to the District Court on April 1, 1977, by all parties to this litigation. As the District Court recognized, 446 F. Supp. at 782, the parties were not in an adversary posture with respect to the decree presented.

Surely if petitioners had the right to appeal the District Court's order refusing to enter the

consent decree, so did respondents. Had this occurred, this Court's decision in Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971), would be squarely on point and would require dismissal of the petition for the failure of this matter to fulfill the "case or controversy" requirements of Article III, § 2 of the United States Constitution. In Moore, both the appellant and the appellee took the position in this Court that the anti-busing statute at issue was constitutional thus requiring this Court to hold that the action presented no case or controversy.

This case presents essentially the same lack of adversity as did Moore, supra, and the same result is required, that is, dismissal of the

petition. The respondents are no less "losers" with respect to the June 1, 1977, order of the District Court than are petitioners. All parties approached the District Court with a proposed consent decree and all parties were denied the benefits and burdens of that decree. The petitioners elected to appeal that order; the respondents did not. Since the presentation of the proposed consent decree to the District Court, this has not been an adversary proceeding.

Subsequent to the September 14, 1979, decision of the Court of Appeals dismissing petitioners' appeal and its issuance of mandate on October 5, 1979, respondents filed a motion with the District Court on October 10, 1979, requesting that the Court establish a pre-trial conference

pursuant to Rule 16 of the Federal Rules of Civil Procedure for the purpose of establishing a trial date and considering such other matters as might aid in the disposition of the case. In that motion, which is found as an appendix to this brief, the respondents noted that they no longer consented to the entry of the proposed decree which had been presented on April 1, 1977, and that the matter was in a posture to be tried on the merits.

The consent decree which was presented to the District Court on April 1, 1977, and refused by it on June 1, 1977, provided, inter alia, that every current and future regular employee at the Richmond Leaf facility of American Brands, Inc. be credited, for competitive and benefit seniority

purposes, with actual time worked as a seasonal employee. This proposed decree was thus formulated by the parties and reviewed by the District Court without benefit of this Court's decisions in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and California Brewers Association v. Bryant, 48 U.S.L.W. 4156 (February 19, 1980).

Clearly, the state of the law in the seniority system area has taken on an entirely new form since the proposed decree was framed. Teamsters and California Brewers instruct that "[t]he propriety under § 703(h) of . . . parallel seniority tracks cannot be doubted," 48 U.S.L.W. at 4159, and that the separation of seniority tracks does not "derogate from the identification of the

provisions as a 'seniority system' under § 703(h)." Id.

The respondents' withdrawal of consent to the decree after the decision of the Court of Appeals and after Teamsters takes on even greater significance in light of California Brewers, for a challenge to the validity of separate seniority tracks forms precisely the heart of petitioners' complaint. The parties must remain free to either devise a new consent decree reflecting recent developments in the law, or else proceed to trial and determine the issue of liability under standards now in effect.

Under these circumstances, the questions presented in the petition are moot since respondents do not now consent to the entry of the

decree. See, United States v. City of Jackson, 519 F.2d 1147, 1151 (5th Cir. 1975). The appealability of the District Court's order is purely academic. There is no longer a "live controversy" between parties having adverse interests. Franks v. Bowman Transportation Co., 424 U.S. 747 (1976).

This court has always refused to decide moot cases on the general ground that the judgment of this Court could not be carried into effect when there is no "subject matter on which the judgment of the law can operate". See, e.g., Ex Parte Baez, 177 U.S. 378 (1900). Since a decision of the issues presented by the petitioners can have no operative effect in this litigation, the case is now moot and the petition should be dismissed.

II. There is No Conflict Among the Courts of Appeal on the Issue Presented by the Petition

Contrary to the arguments of petitioners, no reported cases have been found by respondents other than that of the Court of Appeals below which have ruled on the appealability under 28 U.S.C. § 1292(a)(1) of an order refusing to enter a consent decree in employment discrimination litigation.

Petitioners endeavor to create such a conflict by arguing that the Court of Appeals below noted that Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978) and Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied 401 U.S. 912 (1971) were in conflict and that its decision was in accord with Seigal. 606 F.2d at 423-24.

First of all, the Court of Appeals did not "specifically note" that its decision was in accord with Seigal. More importantly, however, is the fact that both of these cases, which involved the appealability of a refusal by the trial court to enter a consent judgment in stockholders' derivative suits, were decided only by applying the "collateral order doctrine" established by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). These circuit courts did not decide whether the trial courts' orders were ones "refusing injunctions" and thus appealable under 28 U.S.C. § 1292(a)(1), the issue in this case. In short, there have been no conflicting decisions identified by petitioners which this Court should

now rectify by a decision as to the appealability of the order in question under 28 U.S.C. § 1292(a)(1).

As noted elsewhere, the other questions presented by petitioners for review in this Court were either not presented to or not considered by the Court of Appeals below and are therefore not proper for consideration at this time by this Court. Tacon v. Arizona, supra, 410 U.S. 351 (1973).

III. The District Court's Order Refusing to Enter a Consent Decree is not Appealable Under 28 U.S.C. § 1292(a)(1)

Section 1292(a)(1) of Title 28, U.S. Code, provides, inter alia, that the ". . . courts of appeal shall have jurisdiction of appeals from: (1) interlocutory orders of the

district courts . . . refusing . . . injunctions . . . ." Though no reported case has been found in which a court of appeals was asked to review the refusal to enter a proposed consent decree in employment discrimination litigation, the recent case of Gardner v. Westinghouse Broadcasting Co., 437 U.S. 438 (1978) is persuasive authority that such orders are not appealable as denials of injunctions.

This Court held in Gardner that the denial of class certification in a case where the plaintiff was seeking broad injunctive relief was not appealable under 28 U.S.C. § 1292(a)(1). The Court reasoned that the order was not one of irreparable consequence, that it could be reviewed both before and after judgment, that it did not affect the merits of the

plaintiff's suit and that it did not pass upon the legal sufficiency of any of the claims for injunctive relief. Reliance was placed, in part, on an earlier case in which the Court reviewed the history surrounding the adoption of § 1292(a)(1) and which held that the statute was enacted ". . . to permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable, consequence." Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955).

As was true of the order sought to be appealed in Gardner, supra, the District Court's order in this case similarly has no serious or irreparable impact on the merits of petitioners' claims below for they retain the right to proceed to trial

on the merits without the loss of any of their claims for injunctive relief.

Petitioners argue that this Court's decisions have established six criteria to be used in deciding whether a particular interlocutory order is appealable under 28 U.S.C. § 1292(a)(1): The order must (1) be unconditional and entered before trial, (2) do more than direct the case to proceed to trial, (3) settle, tentatively or finally, some aspects of the merits of the claims, (4) pass on the legal sufficiency of the claims for injunctive relief, (5) have an irreparable effect, and (6) not be one which can be reviewed before and after final judgment. (Petitioners' Brief at 25-26).

Assuming the validity of this analysis, the petitioners' case fails to satisfy the requirements of their asserted test. As to the first criterion, while the District Court's order was entered before trial, it was not in any sense unconditional with respect to whether or not the parties could resolve this matter by presenting a new consent decree to the court which would be entered. In fact, in its opinion, the District Court invited the parties to attempt to settle " . . . their differences without a violation of the law and without violating the right of any class members . . ." and that, if such was done, the court would enter an appropriate order. 446 F. Supp. at 791. This express invitation negates a finding of an unconditional refusal

to enter a consent decree in this case.

Secondly, it is clear that the District Court's order did nothing more than direct that the parties either proceed to trial or make another attempt to propose a consent decree, if they so desired. The order cannot be read to have done more.

Thirdly, it is apparent that the order did not settle, either tentatively or finally, as argued by petitioners, any aspect of the merits of their claims for relief. The District Court merely held that the parties could not dispose of the litigation in the precise manner they had chosen, but rather would be required to resolve the case in a different way or proceed to a trial.

Petitioners' arguments notwithstanding, the District Court order did not pass upon the legal sufficiency of their claims for injunctive relief. If anything, the Court held that certain types of injunctive relief might not be appropriate for reasons stated in its opinion, but the District Court did not make any ruling that plaintiffs, if they prevailed in the litigation, would be entitled to no injunctive relief.

Petitioners make the argument on the fifth criterion that the refusal to enter the proposed consent decree works an irreparable harm on the parties "by forcing them to undergo an expensive, unwanted, and unwarranted, trial" (Petitioners' Brief at 28). As noted, after the

District Court's order was entered, the plaintiffs were free to proceed to a trial of their case on the merits just as they would have been expected to do had no consent decree been proposed to the District Court. Surely it is not irreparable harm to require one to try a case which he has voluntarily filed in accordance with the law and the Federal Rules of Civil Procedure. No court has ever held that it is an irreparable harm to require one to meet the burdens of proof required of plaintiffs in a civil action.

IV. The Collateral Order Doctrine Does Not Apply

Petitioners expressly represented to the Court of Appeals that the order they sought to reverse was not a "collateral order" within

the exception to the finality requirements of 28 U.S.C. 1291 established in Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. 541 (Appellants' Supplemental Memorandum at 2). Yet, in their petition to this Court, they argue strenuously both for the first time and in contradiction to their position below, that the District Court's order refusing the consent decree is an appealable collateral order. As expressed earlier, the Court should not consider arguments made for the first time here, particularly when they have been previously disavowed. In any event, the argument is without merit.

Though the District Court's order is clearly not final, this Court established an exception to the

finality rule in Cohen, supra, for those orders that finally determine rights collateral to those asserted in the main action which are too important to be denied review and too independent of the case itself to require the deferral of appellate consideration.

This Court recently dealt with the Cohen exception to finality in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) in which the following requirements for an appealable collateral order were set forth:

> To come within the "small class" of decisions excepted from the final judgment rule by Cohen, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action,

> and be effectively unreviewable on appeal from a final judgment. 437 U.S. at 468.

As to the first requirement that the order "must conclusively determine a disputed question", the second circuit noted in Seigal v. Merrick, supra, that a rejection of a proposed settlement or consent decree is not in any way "final" except in the sense that "that particular settlement will never be revived." Id., 590 F.2d at 38. The order at issue in this case in no way makes a final determination of whether the case may be settled, but only rejects a particular proposal. Thus the collateral order doctrine is inapplicable in this case.

CONCLUSION

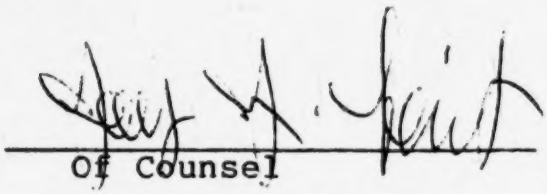
For all of the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be denied.

AMERICAN BRANDS, INC., t/a
THE AMERICAN TOBACCO COMPANY

By Henry T. Wickham
Of Counsel

Henry T. Wickham
D. Eugene Webb, Jr.
Mays, Valentine, Davenport & Moore
23rd Floor, F&M Center
Post Office Box 1122
Richmond, Virginia 23208

LOCAL 182, TOBACCO WORKERS
INTERNATIONAL UNION and
TOBACCO WORKERS INTERNATIONAL
UNION

By 
Of Counsel

Jay J. Levit
422 E. Franklin Street
Imperial Building - 3rd Floor
Richmond, Virginia 23219

James F. Carroll
Air Rights Building, Suite 727E
7315 Wisconsin Avenue, NW
Washington, D. C. 20014

CERTIFICATE OF SERVICE

I certify that true copies of the Brief in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Napoleon B. Williams, Jr., Esquire, 10 Columbus Circle, Suite 2030, New York, New York 10019; Barry L. Goldstein, Esquire, 806 15th Street, N.W., Suite 940, Washington, D. C. 20005; and to Henry L. Marsh, III, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, P. O. Box 27363, Richmond, Virginia 23261, counsel for petitioners, in accordance with Rule 33 of the Rules of the Supreme Court of the United States.

Jerry T. Wallace

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

FRANK L. CARSON, et al., Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 75-0553-R
AMERICAN BRANDS, INC., et al., Defendants.	)	

MOTION

The defendants American Brands, Inc., Local 182, Tobacco Workers International Union, and Tobacco Workers International Union, by their respective counsel, move the Court for an order establishing a pre-trial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure directing the attorneys for the parties to appear to establish a trial date and to consider such other matters as may aid in the disposition of this action. In support of this motion the defendants assert that they do not now consent to the entry of the proposed Decree which was presented to the Court by the parties at the final pre-trial conference on April 1, 1977, and that the case is once again before this Court, the appeal by plaintiffs having been dismissed by the Court of Appeals for the Fourth Circuit on September 14, 1979, and the mandate having issued on October 5, 1979.

AMERICAN BRANDS, INC.

By _____
of Counsel

Henry T. Wickham
D. Eugene Webb, Jr.
Mays, Valentine, Davenport & Moore
23rd Floor, F&M Center
Post Office Box 1122
Richmond, Virginia 23208

LOCAL 182, TOBACCO WORKERS
INTERNATIONAL UNION and
TOBACCO WORKERS INTERNATIONAL UNION

By _____
Of Counsel

Jay J. Levit
Imperial Building
Third Floor
5th and Franklin Streets
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion was mailed to Henry L. Marsh, III, Esquire, Hill, Tucker & Marsh, 214 East Clay Street, P. O. Box 27363, Richmond, Virginia 23261, this 12 day of October, 1979.

_____

Supreme Court, U. S.
FILED
APR 9 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
P.O. Box 27363
Richmond, Virginia 23261

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401

JACK GREENBERG
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
Suite 2030
10 Columbus Circle
New York, New York 10019

BARRY L. GOLDSTEIN
Suite 940
806 15th Street, N.W.
Washington, D.C. 20006

Counsel for Petitioners

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
RESPONDENTS DO NOT STATE ANY SUBSTANTIAL REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED	1
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Cases	
Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970)	3
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	2,6,7
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	8
Duke Power Co. v. Caroline Environmental Study Group, 438 U.S. 59 (1978)	3
Flast v. Cohen, 392 U.S. 83 (1968)	3
Flinn v. FMC Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1967)	3
Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971)	3,4
Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) cert. denied, ISI v. Meyers, 401 U.S. 912 (1971)	5,6,7
Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767 (2d Cir. 1975), cert. denied, 427 U.S. 911 (1976)	3
Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978)	5,6,7,8
Warth v. Seldin, 422 U.S. 490 (1975)	3

Page

Statutes

28 U.S.C. § 1291 2,6,8

28 U.S.C. § 1292(a)(1) 6,7

Other Aurhorities

Rule 23(e), Federal Rules of Civil Procedure 4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1263

==========

FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL, TOBACCO WORKERS INTERNATIONAL UNION,

==========

Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit

==========

ARGUMENT

RESPONDENTS DO NOT STATE ANY SUBSTANTIAL REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Respondents have advanced in their brief three arguments in opposition to petitioners'

request for a writ of certiorari. First, they assert that no case or controversy exists within the meaning of Article III of the Constitution. Second, they claim that there is no conflict between the circuits on the issues presented by the petition. Third, they argue that the appealability of the district court's order as a collateral order, under the exception to 28 U.S.C. § 1291 which this Court formulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), was neither presented below by the parties not decided below by the Court of Appeals for the Fourth Circuit. Each of these contentions is frivolous and without any merit whatsoever.

With respect to respondents' claim that no case or controversy is presented by these proceedings, the facts show that respondents opposed the appeal of the district court's order to the Fourth Circuit and presently oppose petitioners' request to have this Court grant a writ of certiorari. Moreover, respondents seek to withdraw from the proposed consent decree and, if successful, to contest, at trial, petitioners' subsequent efforts to establish the truth of the allegations of the complaint. Indeed, respondents' opposition to the grant of a writ of certiorari, as well as

their opposition to the appeal below, was simply a means employed to effectuate withdrawal from stipulation to enter into a consent decree. In light of these facts and the additional fact that the stipulation, like any contractual arrangement, is binding if judicially sanctioned,[1/] the controversy between the parties is sufficiently acute, concrete, and potentially damaging to the parties' legal rights and interests, to satisfy the case or controversy standard and to satisfy the standing requirement. See Flast v. Cohen, 392 U.S. 83, 94-103 (1968); Association of Data Processing Service Organization v. Camp., 397 U.S. 150, 151-154 (1970); Warth v. Seldin, 422 U.S. 490, 498-501 (1975); Duke Power Co. v. Carolina Environmental Study Group., 438 U.S. 59, 70-82 (1978).

Respondents cite this Court's decision in Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971) in support of their contention that the petition should be dismissed

---

1/ District courts do not have unlimited discretion in approving or disapproving class action settlements. See Flinn v. FML Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1967); Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic., 514 F.2d 767 (2nd Cir. 1975), cert. denied, 427 U.S. 911 (1976).

for lack of a case or controversy. In Moore, however, this Court found that there was an absence of a case or controversy because both parties had urged the court to hold the applicable anti-busing statute constitutional. Here, by contrast, the opposing parties have taken opposing sides on the issue of the appealability of the district court's order. Furthermore, the parties have differing views on whether the consent decree is capable of enforcement against respondents. Thus, a controversy exists between petitioners and respondents. To the extent that respondents' argument rests on a more general premise that settlement proposals per se preclude a case from satisfying the case or controversy requirement, the premise conflicts with Rule 23(e) of the Federal Rules of Civil Procedure. Moreover, the argument fails to give recognition to the ancillary character of settlement proceedings. Worse, it would, if given the scope contended for by respondents, remove the judiciary entirely from any role in settling cases and controversies. Thus, respondents' argument reduces to an absurdity and shows that this case is no less a case or a controversy because the parties have attempted to settle it.

Respondents' further contention that a conflict does not exist between the circuits on the question of the appealability of a district court's order refusing approval of a proposed consent decree, has been answered by petitioners in their petition for a writ of certiorari. The opinion of the Fourth Circuit shows plainly, respondents' contentions to the contrary notwithstanding, that the Fourth Circuit regarded its decision herein as being in accordance with that of the Second Circuit in Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978) and in conflict with that of the Ninth Circuit in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, ISI v. Meyers, 401 U.S. 912 (1971).

Respondents' final argument is that the appealability of the district court's order as a collateral order was not argued below[2/] or decided by the Fourth Circuit.[3/] Neither allegation is true. A review of the Supplemental Reply Memorandum submitted by petitioners in the Fourth Circuit shows clearly that petitioners

---

2/ See Brief in Opposition to Petition for Writ of Certiorari, at 20-21.

3/ Id. at 2, 13, 20-21.

argued in that court that the district court's order was appealable as an exception to 28 U.S.C. § 1291 under the collateral order doctrine expounded in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[4/] Respondents' argument to the contrary is totally frivolous.

4/ In petitioners' Supplemental Reply Memorandum submitted before the Fourth Circuit, it was alleged by petitioners that:

> In their supplemental memorandum, defendants contend that the district court's order rejecting the proposed settlement in this action is appealable neither as a final order under 28 U.S.C. § 1291 nor as an order refusing an injunction under 28 U.S.C. § 1292(a)(1). Relying on Seigal v Merrick, ___ F.2d ___, 47 U.S.L.W. 2418 (2nd Cir., Dec. 14, 1978), defendants argue that the district court's order here does not meet the "collateral order doctrine" of Cohen v. Beneficial Indus. Loan Corp. (citations omitted) . . . .
>
> At the outset, plaintiffs point out that the holding in Seigal with respect to 28 U.S.C § 1291 would only be pertinent were this not a case involving a district court's order refusing an injunction. As the Court recognized in Seigal, there is a conflict among the circuits as to whether the disapproval of a proposed settlement in a stockholding derivative suit is appealable as a collateral order under 28 U.S.C § 1291.

Respondents are similarly in error in alleging that the Fourth Circuit did not decide the issue of the appealability of the collateral order doctrine to the judgment below. What respondents overlook, in their assertion is that the Fourth

---

4/ cont'd.

> See Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, 401 U.S 912 (1971). Neither Cohen nor Seigal involved any discussion of injunctive relief or possible jurisdiction under 28 U.S.C. § 1292(a)(1). Because the case at bar does involve the refusal of injunctions, an independent basis for appeal under 28 U.S.C § 1292(a)(1) is present. It is for this reason that plaintiffs stated in their supplemental memorandum that Seigal is inapplicable to this case.
>
> Were it not for the refusal of injunctive relief, this Court would be faced with the difficult task of choosing between the holding of the Second Circuit in Cohen and the holding of the Second Circuit in Seigal. Because the district court's order rejecting the settlement here is an "interlocutory order of the district court" . . . refusing . . . injunction, "that question need not be reached, and this Court should entertain this appeal under 28 U.S.C. § 1292(a)(1)."

Appellants' Supplemental Reply Memorandum at 1-3.

Circuit conducted its extended discussion of the Second Circuit's opinion in Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) and of this Court's opinion in Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978), for the sole purpose of determining the appealability of § 1291 and the collateral order doctrine to the district court's judgment below. See Part IV of the Fourth Circuit's opinion, App. 6a-8a. Indeed, no other explanation could exist for the Court's extended discussion since appealability under § 1291 was the main issue which was raised in those two cases. Thus, appealability under § 1291 was both argued and determined below.

CONCLUSION

For the reasons set forth herein, petitioners request that their petition be granted.

Respectfully submitted,

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
P.O. Box 27363
Richmond, Virginia 23261

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401

JACK GREENBERG
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
Suite 2030
10 Columbus Circle
New York, New York 10019

BARRY L. GOLDSTEIN
Suite 940
806 15th Street, N.W.
Washington, D.C. 20006

COUNSEL FOR PETITIONERS

SUPREME COURT, U. S.
FILED
JUN 5 1980
MICHAEL RODAK, JR., CLERK

No. 79-1236

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

HARLON L. DALTON
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

Page

Questions presented 1

Statement 2

Discussion 5

Conclusion 11

CITATIONS

Cases:

Alexander v. *Gardner-Denver Co.*,
415 U.S. 36 6

Baltimore Contractors, Inc. v. *Bodinger*,
348 U.S. 176 7

Cohen v. *Beneficial Industrial Loan Corp.*,
337 U.S. 541 ..... 7, 9

Coopers & Lybrand v. *Livesay*,
437 U.S. 463 ..... 6, 9

Gardner v. *Westinghouse Broadcasting Co.*,
437 U.S. 478 ..... 5, 7

Massachusetts Mutual Life Co. v. *Ludwig*,
426 U.S. 479 2

NLRB v. *Sears, Roebuck & Co.*,
421 U.S. 132 2

Norman v. *McKee*, 431 F. 2d 769 ..... 6, 10

Switzerland Cheese Ass'n v. *E. Horne's Market, Inc.*, 385 U.S. 23 ..... 5, 7

United States v. *City of Alexandria*,
614 F. 2d 1358 5

Page

Statutes and rule:

Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.* 2, 4, 6, 9

28 U.S.C. 1291 ..... 1, 4, 6, 9

28 U.S.C. 1292 7

28 U.S.C. 1292(a)(1) 1, 4, 5, 7, 9

42 U.S.C. 1981 2

Fed. R. Civ. P. 23(e) 2

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation of April 14, 1980.

QUESTIONS PRESENTED

1. Whether the district court's order refusing to approve a consent decree providing for injunctive relief in a Title VII case was appealable under 28 U.S.C. 1292(a)(1) as an order refusing an injunction.

2. Whether the district court's order refusing to approve a consent decree was an appealable final decision under 28 U.S.C. 1291.[1]

---

[1]The remaining questions presented by the petition (Pet. 6-7), while raised below, were not passed upon by the court of appeals since the court determined that it lacked jurisdiction over the appeal. Under

STATEMENT

1. Petitioners, representing a class of black present and former seasonal employees and applicants for employment at the Richmond Leaf Department of the American Tobacco Company, a subsidiary of respondent American Brands, Inc., brought this suit on October 24, 1975 under Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.* and under 42 U.S.C. 1981, alleging that the company and respondent union had discriminated against black workers in hiring, promotion, and transfer opportunities.

After conducting extensive discovery, the parties reached an agreement settling petitioners' claims, and jointly moved the district court for approval of the settlement pursuant to Fed. R. Civ. P. 23(e) and entry of a proposed consent decree. The district court, in a memorandum opinion and order filed June 2, 1977, refused to enter the proposed decree on the ground that it illegally granted racial preferences to black employees (Pet. App. 28a-51a).

On September 14, 1979, the court of appeals, sitting *en banc*, dismissed petitioners' appeal for lack of jurisdiction, with Chief Judge Haynsworth and Circuit Judges Winter and Butzner dissenting (Pet. App. 1a-27a).

2. The facts accepted as true by the district court for the purpose of considering the consent decree demonstrated that American Brands, Inc. has two categories of employees—regular employees who work year-round and seasonal employees who work an average of six months a year (Pet. App. 29a-30a). Prior to September 1963, certain of the regular job classifications

---

such circumstances, this Court ordinarily declines to consider issues. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479 (1976).

were reserved for whites and all seasonal employees were black (Pet. App. 30a). Although blacks were hired after September 1963 into regular job classifications and, as of February 1976, constituted 66% of the regular employees, seasonal employees continue to be all black (*ibid.*).

Separate seniority rosters are maintained for regular and seasonal employees. Seasonal employees may transfer to regular positions only when no regular employee is interested in the particular position, and in so doing they lose all accumulated seniority (Pet. App. 30a). Since seniority governs promotions, demotions, layoffs, recalls and vacations, the loss incurred by transfer to a regular position is significant (Pet. App. 31a).

Although blacks constitute 66% of the company's regular employees and 84% of its production unit, only 20% of the supervisory positions are held by blacks (Pet. App. 31a).

The consent decree negotiated by the parties proposed modifications of the seniority and transfer policies which would allow seasonal workers to maintain their seniority upon transfer to regular positions and would require that, prior to hiring from the outside, seasonal employees be given the opportunity to fill vacancies not filled by regular employees for all hourly paid permanent production jobs and for the job of watchman, formerly reserved for whites (Pet. App. 32a-33a).[2] The decree also eliminated the requirement that seasonal employees serve an additional probationary period after transfer to regular positions (Pet. App. 33a). In addition, the decree set a

---

[2]Of 16 watchmen employed by the company in February 1976, only one was black (Pet. App. 30a).

goal for the filling of production supervisory positions with qualified blacks so that 1/3 of such positions would be held by blacks by December 31, 1980 (Pet. App. 33a).

Finally, the proposed decree contained an injunction prohibiting respondents from discriminating against black workers and a three-year reporting requirement so that compliance with its provisions could be monitored (Pet. 14).

3. The district court concluded that because respondents expressly denied having discriminated against the class of petitioners, the foregoing provisions of the decree (which benefitted only seasonal employees all of whom are black) constitute preferential treatment prohibited by Title VII and the Constitution (Pet. App. 32a, 45a-48a). The court also concluded that even if there was evidence of present discrimination or the present effects of past discrimination, the relief envisioned by the decree would be inappropriate because it was not limited to actual victims of that discrimination (Pet. App. 39a-42a, 46a).

4. The court of appeals dismissed the appeal, holding that the district court's order refusing to approve and enter the consent decree was neither a final decision appealable under 28 U.S.C. 1291 nor an order refusing an injunction under 28 U.S.C. 1292(a)(1) since "[t]he immediate consequence of the order is continuation of the litigation and * * * the merits of the decree can be reviewed following final judgment" (Pet. App. 2a). The court analogized the order to the denial of a motion for summary judgment which, if granted, would include injunctive relief, and to the denial of class certification where the complaint seeks broad injunctive relief. Noting that in both of those circumstances this Court has held

that no appeal would lie (*Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)), the court of appeals concluded that the result should be the same here (Pet. App. 5a-6a).

Three of the seven judges dissented, concluding in an opinion by Judge Winter that the order declining to approve the consent decree was appealable under 28 U.S.C. 1292(a)(1) (Pet. App. 18a). The dissenting judges distinguished the district court's order from the refusal to certify a class in *Gardner*, *supra*, reasoning that a refusal to enter a consent decree cannot be effectively reviewed following final judgment (Pet. App. 20a-21a). Similarly, the dissenters distinguished the challenged order from the denial of summary judgment in *Switzerland Cheese*, *supra*, reasoning that here the district court conclusively determined important issues adversely to petitioners' claims (Pet. App. 21a).[3]

DISCUSSION

The decision below is in conflict with the Fifth Circuit's decision in *United States* v. *City of Alexandria*, 614 F. 2d 1358 (1980), regarding whether a district court order refusing to enter a consent decree containing injunctive provisions is an order refusing an injunction within the meaning of 28 U.S.C. 1292(a)(1).[4] It is also in conflict

---

[3]Turning to the merits of the appeal, the dissenting judges concluded that the district court abused its discretion in refusing to approve the decree (Pet. App. 22a-26a). They would have modified the decree, however, to give notice and an opportunity to object to a sub-class for whom no relief was provided in the settlement.

[4]The court in *City of Alexandria* sought to distinguish the instant case as "relating to" a class action. 614 F. 2d at 1361 n.5. However, "[t]he appealability of any order entered in a class action is

with the Ninth Circuit's decision in *Norman* v. *McKee*, 431 F. 2d 769 (1970), regarding whether an order refusing to enter a consent decree is a "final decision" within the meaning of 28 U.S.C. 1291. Accordingly, review by this Court is warranted.

Furthermore, the decision below frustrates an important congressional policy embodied in Title VII of the Civil Rights Act of 1964. As this Court recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted):

> Congress enacted Title VII * * * to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. * * * Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.

If appellate review of a district court's refusal to enter a consent decree is not available until after the case has been tried and a final judgment entered, the benefits envisioned by Congress from voluntary resolution of employment discrimination claims will be irrevocably lost to the parties. For this reason as well, further review is warranted.

1. As a general rule, appellate review of district court orders is limited by statute to final decisions. 28 U.S.C. 1291; *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978); *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*. However, exceptions to the rule have been recognized

---

determined by the same standards that govern appealability in other types of litigation." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978).

both by judicial decision (see, *e.g.*, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-547 (1949)), and by statute (28 U.S.C. 1292) where interlocutory review would serve the interests of justice.

Section 1292(a) provides that "[t]he courts of appeals shall have jurisdiction of appeals from: (1) [i]nterlocutory orders * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court." An order refusing to approve a consent decree providing for injunctive relief would appear to come within that Section's plain language. However, this Court has stressed that Section 1292(a)(1) "does not embrace orders that have no direct or irreparable impact on the merits of the controversy." *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, 437 U.S. at 482. Thus, the touchstone for determining whether an order falls within the Section is whether it is "of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955).

In *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, *supra*, this Court held that an order denying a motion for summary judgment was not "interlocutory" within the meaning of Section 1292(a)(1) because it related only to pretrial procedures and did not touch on the merits of the claim. The Court noted (385 U.S. at 25) that the order was "strictly a pretrial order that decides only one thing—that the case should go to trial." And in *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, this Court held (437 U.S. at 480-481) that a denial of class certification was not appealable under Section 1292(a)(1) because "[i]t could be reviewed both prior to and after final judgment; it did not affect the merits of [the plaintiff's] own claim; and it did not pass on the legal sufficiency of any claims

for injunctive relief." In contrast, the district court's order here did much more than merely advance the case to trial. It determined that the relief agreed upon by the parties could not legally be approved by the court. Since nothing short of an admission of discrimination by the respondents or a full trial on the merits (resulting in findings of fact different from those to which the parties stipulated for purposes of settlement) could have persuaded the district court to grant the relief provided in the consent decree, the parties were denied the opportunity to settle their dispute voluntarily.

That opportunity, of course, cannot be recaptured once the case goes to trial.[5] Nor can the propriety of the court's refusal to enter the decree be reviewed after final judgment. A settlement agreement reflects the parties' assessment at a given point of the strengths and weaknesses of their respective cases, and their assessment of the advantages and disadvantages of, and risks and uncertainties inherent in, going to trial. That state of facts, of mind, and of perspective cannot faithfully be reconstructed once intervening events have altered the

---

[5]Notwithstanding the court of appeals' observation (Pet. App. 8a) that "[w]hen a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record," as a practical matter a refusal to enter a consent decree should be viewed as a conclusive determination. Where alternative provisions prove satisfactory to the parties, no appeal would be taken even if available. On the other hand, where agreement cannot be reached, the theoretical existence of alternatives should not foreclose appeal if the court refuses to enter a decree for which agreement in fact has been reached. Moreover, in the instant case there is no realistic possibility of agreement on an alternative settlement since the district court's decision hinged not on any unfairness to either side in the agreed upon settlement, but rather on the legal question whether the relief sought in the proposed decree violates Title VII and the Constitution in the absence of proven or admitted discrimination.

parties' (and the court's) view of the case. Moreover, to the extent the facts adduced at trial vary materially from the facts as they appeared at the time the consent decree was rejected by the court, entry of a judgment based on the terms of the decree is at least arguably improper.

Therefore, the district court's order—given its unreviewability at a later date, its roots in the premise that the relief sought by the parties lacks a legal basis and is itself unlawful, the fact that it deprives the parties of the chance to settle their differences voluntarily, and the fact that it prolongs rather than expedites resolution of this case—comes within the purposes as well as the literal terms of Section 1292(a)(1).

2. For the same reasons, the district court's order is appealable under 28 U.S.C. 1291 as a "collateral order." As this Court has said (*Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468), "[t]o come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen* [v. *Beneficial Industrial Loan Corp.*], the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Viewed one way, the district court's order in this case touched significantly on the merits in that the refusal to enter the consent decree was based on the court's opinion regarding what relief is proper under Title VII and what constitutes "preferential treatment" under that statute. Viewed another way, the order is wholly separate (or separable) from the merits. Whether the consent decree should have been entered is a question separate and apart from whether the plaintiffs would prevail on the merits at trial were the facts underlying the settlement agreement proved. Moreover, a

judgment on the merits would rest on facts actually proved at trial rather than on the findings anticipated by the parties for purposes of settlement. As the Ninth Circuit observed in *Norman* v. *McKee*, *supra*, 431 F. 2d at 773: "The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and it is not in any sense an ingredient of the cause of action. In itself, the district judge's order is final on the question of whether the proposed settlement should be given judicial approval."[6]

---

[6]Respondents argue (Br. in Opp. 6-10) that the questions presented in the petition have been rendered moot by respondents' withdrawal of consent to the entry of the decree. We disagree. In submitting the proposed decree to the court, the parties impliedly agreed to abide by its terms if they are judicially approved. Had one of the parties wished to repudiate the agreement before the district court had an opportunity to act, it would not have been free to do so under the terms of the agreement, though it would have remained free to argue to the court that because of unforeseeable changed circumstances the decree should not be entered (just as a party on like grounds can seek modification of a decree). The same rule should apply on appeal. Otherwise, a party's right to take an appeal is conditioned on the acquiescence of its adversary. Nothing in the proposed decree agreed to by the parties to this case requires that result.

Parties should, of course, remain free to limit and condition their assent to a settlement agreement as they see fit. Here the parties did not enter into a separate agreement, but instead submitted a joint proposed consent decree. Nevertheless, underlying every settlement agreement, written or implied, is the implicit expectation that in deciding whether to approve the settlement the district court will act nonarbitrarily and in conformity with the law.

SEP 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONERS

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
HILL, TUCKER & MARSH
214 East Clay Street
P. O. Box 27363
Richmond, Virginia 23261
(804) 648-9073

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401
(703) 371-3700

JACK GREENBERG
Counsel of Record
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
10 Columbus Circle
Suite 2030
New York, New York 10019
(212) 586-8397

BARRY L. GOLDSTEIN
806 15th Street, N.W.
Suite 940
Washington, D.C. 20006
(202) 638-3278

Counsel for Petitioners

September 2, 1980

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fourth Circuit erred in holding that an order of the district court, which refused to enter a jointly proposed consent decree on the grounds of its alleged illegality, was not appealable under 28 U.S.C. §1291 as a collateral order pursuant to the Court's decision in Cohen v. Beneficial Industrial Loan Corp., 377 U.S. 541 (1949)?

2. Whether there was error in the Fourth Circuit's holding that the district court's order, which denied approval to a proposed consent decree granting a permanent injunction on the ground of the decree's alleged illegality, was not appealable under 28 U.S.C. §1292(a)(1) as an interlocutory order refusing an injunction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES.....	iv
CITATION TO OPINION BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	5
SUMMARY OF ARGUMENT.....	21
A. Appealability Under §1291.....	21
B. Appealability Under §1292(a)(1)....	22
ARGUMENT.....	22
1. INTRODUCTION.....	23
2. THE DISTRICT COURT'S ORDER REFUSING TO APPROVE THE PARTIES' JOINTLY PRESENTED CONSENT ORDER WAS A COLLATERAL ORDER WHICH WAS APPEALABLE AS AN EXCEPTION TO THE FINAL JUDGMENT REQUIREMENT OF 28 U.S.C. §1291.....	25
A. General.....	25
B. The Applicable Law.....	27
C. Application of the Cohen Criteria.....	30

Page

3. THE DISTRICT COURT'S ORDER BELOW IS APPEALABLE UNDER 28 U.S.C. §1292(a)(1) AS AN INTERLOCUTORY ORDER DENYING AN INJUNCTION..... 44

A. The Applicable Law..... 44

B. Criteria Governing The Application of §1292(a)(1)..... 47

1. General..... 47

2. Interlocutory Order..... 48

3. Injunctive Relief..... 49

4. Characteristics of an Injunction..... 55

a. More Than a Mere Pre-trial Order..... 55

b. Determining the Merits..... 56

5. Irreparable Injury..... 61

C. Application of the Criteria Under §1292(a)(1)..... 61

CONCLUSION..... 76

Table of Authorities

Cases	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	24,26,35,75
Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955)	46,47,49,55
Brown v. Chote, 411 U.S. 542 (1973)	43
Catlin v. United States, 370 U.S. 294 (1962)	27
Chappell & Co. v. Frankel, 367 F.2d 197 (2d Cir. 1966)	57,65
Cohen v. Beneficial Loan Corp., 377 U.S. 541 (1949)	20,23,25,28 30,47
Cobbledick v. United States, 309 U.S. 323 (1949)	27,28
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	35,36,71
Dent v. St. Louis-San Francisco Ry Co. 406 F.2d 399 (5th Cir. 1969)	35
Dickinson v. Petroleum Conversion Corp. 338 U.S. 507 (1950)	28,30,40
Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974)	30,40,41
Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935)	45

Cases	Page
Ettelson v. Metropolitan Life Ins. Co. 317 U.S. 188 (1942).....	45
Franks v. Bowman Transportation Co., 424 U.S. 747 (1978).....	11
Gardner v. Westinghouse Broadcasting Co. 437 U.S. 478 (1978).....	35,40,46,48 56,59,66,68 69
General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932).....	56,65
George v. Victor Talking Machine Co., 293 U.S. 377 (1934).....	50
Gillespie v. U.S. Steel Corp., 379 U.S. 148 (1948).....	40
Goldstein v. Cox, 396 U.S. 471 (1970).....	51,52
Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737 (1976).....	68
Maxwell v. Enterprise Wall Paper Co., 131 F2d 400 (3rd Cir. 1942).....	46
Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555 (1963).....	30
Morgenstern Chemical Co. Inc. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950).....	.46,57,65

Cases	Page
Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949).....	45,49
Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, ISI v. Myers, 401 U.S. 912 (1971).....	20,30,39,43 73
Osborne v. Missouri P.R. Co., 147 U.S. 248 (1893).....	43
Peter Pan Fabrics, Inc. v. Dixon Textile Corp., 280 F.2d 805 (2d Cir. 1960).....	55
Radio Station WOW, Inc. v.Johnson, 326 U.S. 120 (1945).....	27
Russell v. American Tobacco Company, 528 F.2d 357 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976).....	8,16
Safe Flight Instrument Corp. v. McDonnel-Douglas Corp., 482 F.2d 1086 (9th Cir.), cert. denied, 414 U.S. 113.....	59
Sampson v. Murray, 416 U.S. 61 (1974).....	61,65
Seigel v. Merrick, 590 F.2d 35 (2d Cir. 1978).....	19,37,38,39 69,70,73
Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935).....	49

Cases	Page
Smith v. Vulcan Iron Works, 165 U.S. 518 (1897)	24,52,53,55
Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822 (2d Cir. 1963), cert. denied, 376 U.S. 11	44,46,60
Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., 385 U.S. 23 (1966)	24,45,47,48 50,55,56,59 66,68
Teamsters v. United States, 431 U.S. 324 (1977)	31,66
United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826 (5th Cir. 1975)	35
United States v. American Friends Service Committee, 419 U.S. 7 (1974)	43
U.S. v. City of Alexandria, __F.2d__ (5th Cir.), 22 EPD ¶30, 828, April 10, 1980	26
United States v. City of Miami, __F.2d__ (5th Cir.), 22 EPD ¶30,821, April 10, 1980	26
United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 61 L.Ed. 2d 480 (1979)	21,22,31,32 34,35,36,41 67,74,75,76

Cases	Page
Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921 (D.C. Cir. 1958).....	61
Weber v. United Steelworkers of America, AFL-CIO, 563 F.2d 216 (5th Cir. 1977).....	22
W.L. Gore & Associates, Inc. v. Carlisle Corp., 529 F.2d 614 (3rd Cir. 1976).....	52

Constitutional Provisions

Fifth Amendment to the Constitution of the United States.....	2,7

Statutes

28 U.S.C. §1254(1).....	2
28 U.S.C. §1253	50,51,52
28 U.S.C. §1291	2,19,21,23,24 25,27,28,29,31,39
28 U.S.C. §1292(a)(1).....	2,19,20,21 22,23,24,27,44,45 46,47,49,50,52,55 56,58,61,63,67,70
42 U.S.C. §1981.....	6
Evarts Act of 1891, 26 Stat. 826.....	44,53,54

Statutes — Page

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq.....3,6,7,17,25 26,30,31,32,35 39,64,65,66,67

Rules

Rule 23(e), Federal Rules of Civil Procedure..... 5,13,23,25 30,36,38

Rule 41(c), Federal Rules of Civil Procedure..... 34

Rule 68, Federal Rules of Civil Procedure..... 34

Legislative History

Remarks of Senator Hubert Humphrey, 110 Cong. Rec., 6548, concerning Title VII Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq..... 74

Other Authorities

Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351 (1952)... 45

Wright & Miller, Federal Practice and Procedure..... 45,48,52

Abbreviated Form

References to "Joint Appendix below" are to the Joint Appendix filed in the Court of Appeals for the Fourth Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1236

==========

FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE
AMERICAN TOBACCO COMPANY; LOCAL 182,
TOBACCO WORKERS INTERNATIONAL,
TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

==========

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

==========

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 606 F.2d 420. The opinion and judgment of the Court of Appeals are set forth in the Appendix to the Petition for a Writ of Certiorari, pp. 1a, 52a. The opinion of the District Court for the Eastern District of Virginia is reported at 446 F.Supp. 790. The opinion and judgment of the District Court are also set forth in the Appendix to the Petition for a Writ of Certiorari, pp. 28a, 51a..

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals dismissing the appeal was entered on September 14, 1979. On June 16, 1980, this Court granted the petition for a writ of certiorari limited to Question 1 presented by the petition. On July 24, 1980, the Clerk of the Supreme Court granted petitioners, pursuant to request, until September 2, 1980 in which to file a brief.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States.

This case also involves the following federal statutes:

a. 28 U.S.C. §1291

> The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

b. 28 U.S.C. §1292(a)

> The court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States,

the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

c. 42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(c) It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

....

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of

the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

d. Rule 23(e), Federal Rules of Civil Procedure

A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

General. On October 24, 1975, petitioners, present and former seasonal employees at the Richmond Leaf Department of the American Tobacco

Company, a subsidiary of American Brands, Inc., which is located in Richmond, Virginia, filed a complaint on behalf of themselves and other black employees at the Richmond Leaf Department.

The complaint charged that defendant American Brands, Inc., defendant Tobacco Workers' International Union, and defendant Local 182 of the Tobacco Workers' International Union, in violation of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, et seq., and 42 U.S.C §1981, discriminatorily denied black workers hiring, promotion, and transfer opportunities and discriminatorily restricted black workers to low paying and otherwise undesirable jobs.

After the conduct of extensive discovery, the district court, on March 1, 1977, certified a class consisting of (1) black persons, currently and formerly employed who were seasonal employees of the American Tobacco Company's Richmond Leaf Department on or after September 9, 1972, and (2) black persons who applied for seasonal employment at the American Tobacco Company's Richmond Leaf Plant on or after September 9, 1972.

The parties reached a settlement of plaintiffs' claims, entered into a proposed consent decree, Joint Appendix 24, and jointly moved for

approval and entry of the proposed decree. The district court denied the motion on the ground that the proposed decree violated the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq. in that it provided, in the absence of proof that defendants had engaged in racially discriminatory actions or that plaintiffs and class members were victims of racial discrimination by defendants, for preferential treatment of black employees on the basis of race and color. 446 F.Supp. at 788-791.

Additionally, it held that both Title VII and the Fifth Amendment to the Constitution of the United States precluded a district court from placing what it termed a "federal stamp of approval" upon an agreement which provided preferential treatment on the bais of race or color in the absence of proof of discrimination by defendant and in the absence of proof that plaintiff and class members were victims of discrimination. 446 F.Supp. at 784

On May 14, 1979, the United States Court of Appeals for the Fourth Circuit ordered the merits of the appeal to be determined en banc. On September 14, 1979, however, the Court of Appeals ordered the appeal dismissed on the ground that

the order appealed from below was not appealable within the intendment of 28 U.S.C. §§1291 and 1292. Chief Judge Haynsworth and Circuit Judges Winter and Butzner dissented in an opinion holding that the order was appealable and that the consent decree should have been approved.

History of Racial Discrimination. American Brands, Inc., employs 150 seasonal employees and 100 regular, or full-time, employees to process and store leaf tobacco at the Richmond Leaf Department of the American Tobacco Company in Richmond, Virginia.[1/] The seasonal employees, all of whom are black, work between six and nine months during the year. By contrast, regular employees, of whom 34% are white, work throughout the year.[2/] Both the seasonal and regular

---

1/ The facts concerning employment statistics of defendant American Brands, Inc. are contained in that defendant's answer to plaintiffs' interrogatories, relevant portions of which are included in the Record below as the parties' Joint Appendix, and are also contained in the opinions below. Moreover, the operation of the American Tobacco Co. is described in Russell v. American Tobacco Co., 528 F.2d 357 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976).

2/ The following table represents the racial composition of the employees at the Richmond Leaf Department from 1968-1976:

employees are represented by defendant Local 182, Tobacco Workers' International Union (herinafter "T.W.I.U.").

Prior to September 16, 1963, union jurisdiction over job positions at the Richmond Leaf Department was divided betweeen Local 182 of the T.W.I.U. and Local 214 of the T.W.I.U. The former, whose membership was then all white, had exclusive jurisdiction over regular job classifications. Local 214's membership was limited to black employees who were seasonal workers at the Richmond Leaf Department.[3/]

While the existence of two separate unions at the Department was officially terminated on September 16, 1963, the pre-existing patterns of

---

2/ (con'd)

Year	Regular Employees		Seasonal Employees	
	Whites	Blacks	Whites	Blacks
1968	41	52	0	116
1970	40	59	0	175
1973	40	56	0	176
1976	37	57	0	135

3/ See defendant American Brand's answer to Interrogatory #14 in Joint Appendix below.

racial discrimination, however, continued in effect at the Richmond Leaf Department as a consequence of regulations and procedures establishing the system of seniority and transfer rights of employees.

Seniority and Transfer Rights.[4/] Prior to September 16, 1963, permanent job vacancies were filled by canvassing the employees within the bargaining unit of the union having jurisdiction of the jobs in which the vacancies existed. This procedure benefitted the white members of Local 182 in the competition for permanent job positions.

Following the 1963 merger of the locals, the rules governing the filling of vacancies in the full-time positions continued to exclude or disadvantage the black workers who had been discriminatorily assigned to seasonal positions. When management requests a job transfer of a regular employee that employee does not lose seniority rights, but when management requests a

---

4/ See defendant American Brand's answers to Interrogatories #20-56 in Joint Appendix below.

seasonal employee to transfer to full-time work that employee loses his seniority rights.

Moreover, when a regular worker transfers from one full-time job to another one the employee retains all of his seniority rights, but when a seasonal worker transfers to a full-time job he loses all of his seniority rights.[5/] Furthermore, a seasonal worker who transfers to a full-time position almost always must enter at a bottom-level position because the regular workers have the first opportunity to move to the vacancies in full-time positions.

Accordingly, if a seasonal worker is employed in a seasonal position above the entry-level, he frequently will be required to suffer a short-term pay cut in order to move into a full-time position. The imposition of these penalties, the loss of seniority and the possible reduction in short-term pay, serve to lock in the effects of the historical

---

5/ The transferring seasonal worker loses not only his "competitive" seniority rights, e.g., rights for job security and promotion, but also his "benefit" seniority rights, e.g., right for sick leave and vacation, except for retirement benefits. Cf. Franks v. Bowman Transportation Co., 424 U.S. 747, 765 (1976).

discriminatory practices which existed at the Richmond Leaf Division. These practices were responsible, as of February 13, 1976 for creation of a situation in which only one of the 16 positions of watchman was held by a black employee.[6/]

The historical practices of discrimination have continued to limit the employment opportunities of black workers for supervisory as well as hourly jobs. Almost invarably the Company selects its supervisory employees from its full-time staff. The Company has never promoted a seasonal worker directly to a supervisory position. The continuation of the effects of the past segregative practices has resulted in the selection of a disproportionately small group of the Company's black employees as supervisors. As of April, 1976, only 20% of these positions were filled by blacks.[7/]

6/ See defendant American Brand's answer to Interrogatory #15(c) continued in Joint Appendix below.

7/ Id. Interrogatory #65.

Proposed Consent Decree. Discovery conducted by the parties following the commencement of this lawsuit showed dramatically the degree to which particular job classifications could be identified by race. It also showed the extent to which seniority rules and transfer rules impinged on the capacity of defendants to eradicate the vestiges of past racial discrimination. The parties, of course, had differing views on the extent to which such lingering effects exist. To resolve their disagreement and to settle the controversy, the parties negotiated a proposed consent decree settling all claims outstanding between them and presented it to the district court, in accordance with Rule 23(e) of the Federal Rules of Civil Procedure.

One of the principal features of the proposed consent decree[7/] was a seniority clause requiring

---

7/ Part III of the proposed consent decree stated the following:

" III. INJUNCTIVE RELIEF FOR THE CLASS

In full and final settlement of any and all claims for injunctive relief alleged in the Complaint, the parties agree to the following:

1. For the purposes of determining eligibility for vacations and for promotions,

current and future employees to be credited with actual time worked at the plant as seasonal employees. Another feature of the proposed

---

7/ (contd.)
lay-offs and recalls, every current and future regular hourly paid production employee of the Richmond Leaf Department will be credited with actual time worked as a seasonal employee commencing with the date of hire of the last period of continuing employment as a seasonal employee in accordance with Section 1 of Article 7 of the current collective bargaining agreement governing seasonal employees. The combined total of such seasonal and regular employment will apply toward service requirements for vacations, and for promotions, demotions, lay-offs and recalls.

2. Regular employees who have served the probationary period as a seasonal employee during the last period of his or her continuous seasonal employment at Leaf prior to being transferred to regular Lear employment will become eligible for medical benefits and sick benefits immediately upon such transfer to regular employment.

consent decree allowed seasonal employees to transfer to permanent job positions as vacancies occurred provided, of course, no regular employees

---

7/ (contd.)

3. In the event that vacancies in hourly paid permanent production job classifications at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production employees will be given the opportunity to fill such vacancies prior to hiring from the outside.

4. In the event that vacancies in the job classification, Watchman, at the Richmond Leaf Department are not filled by regular production employees, then all qualified hourly paid seasonal production will be given the opportunity to fill such vacancies prior to hiring from the outside.

5. The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.

See Joint Appendix at 27a-28a.

desired the positions.

These provisions were patterned after the relief fashioned for seasonal workers in Russell v. American Tobacco Company, supra, 528 F.2d 357, 362-64 (4th Cir. 1975), cert. denied, 425 U.S. 935 (1976). Under the first above-mentioned feature of the proposed consent decree, seasonal workers are allowed to maintain their seniority upon transfer to regular positions. Under the second feature, seasonal employees are permitted to bid on vacancies in classifications, such as watchmen, which were once reserved for whites.

In addition, the proposed consent decree contained, in Part III, section 5, an affirmative action provision to reduce a historical underrepresentation of blacks which had existed in the supervisory positions. This provision provided that:

> The Richmond Leaf Department adopts a goal of filling the production supervisory positions of Foreman and Assistant Foreman with qualified blacks until the percentage of blacks in such positions equals 1/3 of the total of such positions. The date of December 31, 1980 is hereby established for the accomplishment of this goal.
> Joint Appendix at 31a.

Furthermore, the consent decree eliminated the requirement that seasonal workers must serve a

probationary period when they transfer to a full-time position. Finally, the decree contained a general injunction prohibiting the defendants from discriminating against black workers and a reporting provision requiring the Company to submit for a three-year period specific reports detailing compliance with the Decree. Joint Appendix at 31a.

All of the parties found that these provisions represented, in light of the history of the Richmond Leaf Department, a settlement that was reasonable, just, and fair to all concerned[8/]. Despite their agreement, the district court, by order filed June 2, 1977, denied the joint motion of the parties to approve and enter the proposed consent decree.

Several reasons were offered by the district court in support of its refusal to grant the motion. First, the district court judge stated that Title VII of the Civil Rights Act and the due process clause of the Fifth Amendment to the

---

8/ See the Memorandum in Support of Entry of Proposed Consent Decree filed by defendant American Brands, Inc. in the district court. Also, see Memorandum in Support of Entry of Proposed Consent Decree filed in the district court by the two union defendants on April 15, 1977.

Constitution prohibited the defendant employer, defendant, unions, and the district court from granting preferential treatment to employees based upon race except upon a showing of past or present discrimination committed by the defendants.

Second, the district court said that the proposed consent decree was fatally flawed in seeking to provide for preferential treatment for black employees who were not shown to be victims of discrimination. Moreover, because the introductory section of the proposed consent decree contained a provision in which defendants denied that their actions had been discriminatory or unlawful, and contained another provision in which plaintiffs stated that they did not admit that defendants' actions were lawful, the district court concluded that there was not "create(d) any factual basis upon which relief may be granted." 446 F.Supp. at 788-789.

The district court conceded, however, that prior to September 1963, the "regular job classifications of truck driver, watchman, maintenance, storage, and boiler operator ... were reserved for whites only", 446 F.Supp. at 782, and that, as of April 5, 1976, only 20% of the 35 supervisory positions were filled with black employees. Id. at 783.

Petitioners appealed the district court's order to the Fourth Circuit. That court dismissed the appeal on the ground that the order was non-appealable under 28 U.S.C. §§1291 and 1292 (a)(1).

In holding that the district court's judgment was not appealable as an interlocutory decree denying an injunction, the Court of Appeals said, "Here, injunctive relief was not finally denied; it was merely not granted at this stage of the proceedings." 600 F.2d at 423. It regarded the order as deciding only that the case should go to trial. Id. at 423.

Following the rationale of the Second Circuit in Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978), it held that disallowance of the interlocutory appeal would strengthen the power of the district courts to draw parties into presenting more favorable settlement proposals. The denial of one agreement, it said, did not necessarily prevent a more "sweetened" agreement from being approved. 606 F.2d at 423-24. The court was oblivious to whether the order decided the merits of the action. It stated that "whatever the district court's reasons for refusing a decree, appeals of rights from those refusals would encourage an endless string of appeals and destroy the district court's supervision of the action as contemplated by Fed.R.Civ.Proc. 23(e)". Id. at 424.

The Fourth Circuit recognized that its decision was contrary to the decision in Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), cert. denied, ISI v. Meyers, 401 U.S. 912 (1971), where the Ninth Circuit had held that orders disapproving proposed settlements of stockholder's derivative suits are appealable as collateral orders.[9/] However, it merely noted the existence of the case and did

---

9/ Although the opinion in the Fourth Circuit below implied that petitioners only sought an interlocutory appeal under 28 U.S.C. §1292(a)(1), 606 F.2d at 421, petitioners, in fact, appealed the decision under both §1291 and §1292(a)(1). To help clarify the matter, the facts concerning the appeal are stated herein.

By letter to the Clerk of the Fourth Circuit Court of Appeals dated January 13, 1978, petitioners stated that the district court's order below was appealable under 28 U.S.C. §1291. Subsequently, however, petitioners filed, on February 9, 1979 a supplemental memorandum in which they stated, on page 2, that the case did not involve the collateral order doctrine of Cohen v. Beneficial Industrial Corp., 377 U.S. 541 (1949).

On February 20, 1979, petitioners filed a Supplemental Reply Memorandum in which they noted the existence of a conflict between the circuits on the issue of appealability under §1291 of a district court's order disapproving a proposed settlement of a derivative action. Because the proposed decree contained a request for an injunction, petitioners stated that jurisdiction could be upheld under §1292(a)(1) without reaching

not state why the court's analysis there was not persuasive.

SUMMARY OF ARGUMENT

A. Appealability Under §1291

Petitioners contend that the order of the district court denying approval to the parties' jointly proposed consent decree was appealable as a collateral order. Separate and apart from the issue of whether defendants have practiced racial discrimination against plaintiffs, this Court has established that a private employer and union can voluntarily establish an affirmative action plan on behalf of black employees in an industry in which there is an imbalance of black employees with respect to white employees arising out of a

---

9/ (contd.)
the issue under §1291. They cautioned, however, that the court would be confronted with deciding the appealability of the order as a collateral order under §1291 if the court could not sustain jurisdiction under §1292(a)(1). See petitioners' Reply to Brief in Opposition to Certiorari, n.4.

Although petitioners subsequently emphasized the appealability of the district court's order under §1292(a)(1) in their Supplemental Brief for the Appellants On Consideration En Banc, they did not, at any time, waive or drop their insistence that the order was appealable as a collateral order under §1291.

historical exclusion of blacks. See United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979). The denial of the right to settle voluntarily the instant action in accordance with principles set forth in Weber, supra, is therefore a collateral order affecting rights collateral to the merits of the action and thus was appealable under §1291.

B Appealability Under §1292(a)(1)

Petitioners contend that an examination of the grounds stated by the district court in support of its order denying approval to entry of a consent decree granting a permanent injunction, discloses that the order resolved the merits of the injunctive claims and of the Title VII claims. Since these grounds precluded the filing of a subsequent motion by petitioners for a preliminary injunction, the district court's order was appealable under §1292(a)(1) as an interlocutory order refusing an injunction.

ARGUMENT

I

INTRODUCTION

This case concerns the appealability of a district court's order which, on the basis of the

Fifth Circuit's opinion in Weber v. United Steelworkers of America, AFL-CIO, 563 F.2d 216 (5th Cir. 1977), subsequently reversed by this Court in United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), refused to approve, pursuant to Rule 23 of the Fed. R. Civ. P., a joint motion by the parties to enter a proposed consent decree granting permanent injunction

Petitioners contend that the order of the district court is appealable, pursuant to the collateral order doctrine, see Cohen v. Beneficial Industrial Loan Corp., 377 U.S. 541 (1949), as an exception to the finality requirement of 28 U.S.C. §1291. Petitioners also submit that the order is appealable under 28 U.S.C. §1292(a)(1) as an interlocutory order denying injunctive relief. The appealability of a district court's order which refuses to enter a jointly proposed consent decree settling the action and granting a permanent injunction, is a case of first impression in this Court.

The interlocutory order of the district court denied approval, under Rule 23(e), of the parties' jointly proposed consent decree and thereby denied their joint request for a permanent injunction. The appealability of orders of the district

courts refusing to approve proposed consent decrees has not been previously determined by the Court. Furthermore, the Court has not, in general, determined when interlocutory orders denying permanent injunctions are appealable under §1292 (a)(1). Compare, e.g., Smith v. Vulcan Iron Works, 165 U.S. 518 (1897) with Switzerland Cheese Asso-tion, Inc. v. E. Horne's Market, Inc., 385 U.S. 23, 23-25 (1966).

This case seemingly presents an opportunity for the Court to resolve both issues. Petitioners submit, however, that there are special factors operative here, such as the Congressional preference for voluntary settlement of Title VII actions, see Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974), and the peculiar nature of the grounds assigned by the district court in support of its order, which will permit the Court to decide this case without determining, in general, the appealability of orders denying proposed settlement decrees or the appealability of orders denying permanent injunctive relief. However, these special circumstances do warrant allowance of an appeal from the order below under both §1291 and §1292(a)(1).

II

THE DISTRICT COURT ORDER REFUSING TO APPROVE THE PARTIES' JOINTLY PRESENTED CONSENT ORDER WAS A COLLATERAL ORDER WHICH WAS APPEALABLE AS AN EXCEPTION TO THE FINAL JUDGMENT REQUIREMENT OF 28 U.S.C. §1291.

A. General

Section 1291 of Title 28 of the United States Code authorizes an appeal to a federal court of appeals of a final "decision" or judgment, of a federal district court. This Court, however, has, in interpreting the statute to effectuate its purposes, made exceptions to the "final judgment" rule. One such exception is the collateral order doctrine under which the Court has allowed the appeal of an interlocutory orders which is collateral to the merits of the underlying action. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

This doctrine, petitioners contend, is applicable to an order of the district court which, in a Title VII action, denied, under Rule 23 of the Fed. R. Civ. P., approval of a proposed consent decree, on the ground that the decree provided preferential treatment on the basis of race to black employees who were not victims of racially discriminatory actions by defendants.

At the outset, petitioners stress the importance of the issue involved. Voluntary settlement of employment discrimination suits lies at the heart of the effort to enforce Title VII. This Court has emphasized that "(c)ooperation and voluntary compliance were selected as the preferred means for achieving" the goal of equal opportunity in employment. Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Judicial review in the courts of appeals of settlement decrees has been extremely instrumental in carrying out this purpose of the statute. See, e.g.,.United States v. City of Miami, ___ F.2d ___ (5th Cir.), 22 EPD ¶30,821, April 10, 1980; United States v. City of Alexandria, ___ F.2d ___ (5th Cir.), 22 EPD ¶30,828, April 10, 1980.

Conversely, disallowance of interlocutory review of orders disapproving proposed settlement decrees is likely to frustrate the achievement of the purposes of Title VII. Not only would it put all voluntary settlements of Title VII actions at the mercy of district judges but it would also force the parties needlessly to undergo expensive, time-consuming trials.

B. The Applicable Law

With the exception of 28 U.S.C. §1292, and certain judicially created exceptions, the appealability of orders of the district court to the federal courts of appeals is limited by 28 U.S.C. §1291 to "final decisions." See Cobbledick v. United States, 309 U.S. 323 (1940); Catlin v. United States, 370 U.S. 294 (1962). In its decision in Cobbledick v. United States, supra, the Court found that Congress, with the enactment of §1291, prohibited "piecemeal disposition on appeal of what for practical purposes is a single controversy ... (and) set itself against enfeebling judicial administration." Id. 309 U.S. at 324.

Moreover, the Court has noted that the purpose of the final judgment rule is to avoid "the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment." Cobbledick v. United States, supra, 309 U.S. at 324. Thus, the final judgment rule, which "has the support of considerations generally applicable to good judicial administration", Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945), is, in the final analysis, designed to enable courts and litigants

to avoid "the mischief of economic waste and of delayed justice." Id. 326 U.S. at 123. Also see Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511.

Despite the laudable goals of §1291, the courts have discovered that there are occasions where a strict application of the final judgment rule will not effectuate the purposes of the statute and instead "would practically defeat the right of any review at all." Cobbledick v. United States, 309 U.S. at 324. In these cases, denial of the right to an immediate appellate review would cause irreparable injury to the party seeking review. This is the basic justification for the Court's adoption of the collateral order doctrine under which certain interlocutory orders can be immediately appealed despite the absence of a final judgment terminating the action.

The collateral order doctrine was articulated and applied in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). There, the Court, in upholding an interlocutory appeal of an order denying a request by defendant for the posting of a bond by plaintiff, observed that the

> order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively

> to review the present order, and the rights conferred by the statute if it is applicable, will have been lost, probably irreperably We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

Id. at 546. Accordingly, it held the order appealable on the grounds that it:

> appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Id. at 546.

The Cohen rule requires that an order must have three basic characteristics before it can qualify as a collateral order. First, the order must adversely affect a right that is separate and independent from whatever rights are asserted in the action. Second, the order must constitute a final determination of those rights. Third, the order must be one whose review cannot be postponed until final judgment because delayed review will cause irreparable harm by causing the rights conferred to be irretrievably lost.

In applying these criteria to determine appealability, a court must adopt a "practical rather than a technical construction" of §1291.

Cohen v. Beneficial Industrial Loan Corp., supra, 337 U.S. at 546. Such an approach will necessitate an evaluation of the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."[10/] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 171 (1974), citing Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950).

C. Application of the Cohen Criteria

This Court has defined a collateral issue as an issue which is "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising plaintiff's cause of action." Mercantile National Bank at Dallas v. Langdeau, 371 U.S. 555, 558 (1963). The right to reach a lawful settlement of a Title VII employment discrimination case pursuant to the guidelines set forth by this Court in Weber, supra, is separate and anterior to the merits of the claims in the Title VII action.

10/ In Norman v. McKee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912, the Ninth Circuit allowed an appeal from a district court's rejection of a settlement agreement. The court said that the settlement of a class action under Fed.R.Civ. P. 23 is appealable as a final decision

The issues in a Title VII action concern issues such as the following: (1) the existence of discriminatory employment practices by defendant; (2) victimization of plaintiff by defendant's discriminatory practices; and (3) the fashioning of remedies that are commensurate in scope with the defendant's violation of law. See, e.g., Teamsters v. United States, 431 U.S. 324 (1977).

By contrast, as this Court indicated in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, where it upheld the lawfulness of a race-conscious affirmative action plan reserving 50% of the openings in an in-plant craft training program for black employees, the relevant issues in determining the lawfulness of a private, voluntarily negotiated affirmative action plan are (1) the extent to which the plan operates to reduce or lessen, pre-existing patterns of racial segregation and hierarchy by opening employment opportunities to blacks in occupational areas which have been traditionally closed to

---

10/ (contd.)
under 28 U.S.C. §1291, because the "inconvenience of piecemeal review of an order disapproving a settlement is outweighed by the danger of denying justice by delay." 431 F.2d at 774.

areas which have been traditionally closed to them; (2) the degree to which the plan unnecessarily trammels the interests of white and other workers or creates a bar to the advancement of their legitimate interests; (3) the temporary nature of the plan; (4) the extent to which the plan is intended to eliminate a manifest racial imbalance and not to maintain racial balance; and (5) the extent to which the signatories to the affirmative action agreement adopted the plan voluntarily. See United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, 443 U.S. at 208.

Moreover, the Court in Weber, supra, explicitly noted that the lawfulness of a private, voluntary affirmative action plan is separate and apart from the issue of a violation of Title VII. It said

> "(S)ince the Kaiser-USWA plan was adopted voluntarily, we are not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act."

Id. 443 U.S. at 200. Thus, the issue of whether plaintiffs and defendants can voluntarily agree upon a bona fide affirmative action plan that grants racial preferences is anterior to and not enmeshed in the issues of a Title VII suit. Weber, supra, 443 U.S. at 200.

The Court's decision in Weber, supra, not only established that the issue of the validity of private affirmative action plans for blacks is separate and independent of legal issues arising in a Title VII action, but also affirmed that private employers and unions have a right under Title VII to enter voluntarily into such plans. Moreover, the Court, in Weber, supra, protected the exercise of this right against opposing claims of third parties, such as employees who prefer to see the plans abandoned. 443 U.S. at 200-209.

Of course, the right to institute an affirmative action plan, such as the one in Weber, only exists when the plan complies with the criteria set forth in Weber, supra, 443 U.S. at 208. As the Court noted in Weber, the adoption of race-conscious, affirmative action plans

> falls within the area of discretion left by Title VII to the private sector voluntarily to adopt affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories.

443 U.S. 209.

It is undisputed, in the present action, that "regular job classifications of truck driver, watchman, maintenance, storage, and boiler operator ... were reserved for whites only" prior to

September 1963. 446 F.Supp. at 782. Similarly, it is undisputed that, prior to September 1963, there existed separate unions for black and white workers. Finally, it is undisputed that the jurisdiction of the union representing black employees was, prior to September 1963, restricted to seasonal employees and that the jurisdiction of the union representing white employees was, at that time, restricted to nonseasonal, regular job classifications.

Since the terms of the proposed consent decree were in all other respects in compliance with the criteria set forth in Weber, supra, petitioners had a right to settle the action as provided by the decision in Weber, supra. Either Rule 41(c) or Rule 68 of Fed.R.Civ.P, could have been utilized by the parties to facilitate settling their grievances without intervention of the courts.[11/]

11/ Fed. R. Civ. P., 41(a) provides that an action may be voluntarily dismissed by the plaintiff with the consent of all parties. Similarly, Rule 68 provides that

> "At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him ... to the effect specified in his offer. If within 10 days after the service of the

This Court has stated that courts should accord deference to the processes of voluntary conciliation and settlement. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). Similarly, the lower courts have sanctioned settlement efforts in civil rights actions. As the Fifth Circuit said in United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 846 (5th Cir. 1975), citing Dent v. St. Louis-San Francisco Ry. Co., 406 F.2d 399, 402 (5th Cir. 1969),

> It is quite apparent that the basic philosopy of these statutory provisions is that voluntary compliance is preferable to court action and that efforts should be made to resolve these employment rights by concilation both before and after court action.

The existence of a right to settle a Title VII action in accordance with the standards set forth in Weber, supra, distinguishes this case from Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) and Gardner v. Westinghouse Broadcasting

---

11/ (contd.)
offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment."

Co., 437 U.S. 478 (1978). In Coopers & Lybrand and Gardner, this Court held that an order refusing certification of a class was not appealable as a collateral order or as an interlocutory order denying an injunction.

The plaintiffs there had no substantive right to have the action certified as a class action under Rule 23. Nor did denial of their claim for class certification affect any substantive rights of theirs. By contrast, petitioners here have a substantive right which is based upon the Court's decision in Weber, supra, and which is supported by Congressional policy promoting settlements of Title VII actions.

Although Federal Rule of Civil Procedure 23(e), to be sure, prevents parties from having an unencumbered right to settle class actions, Rule 23(e) does not negate the parties' legal right to settle the case in accordance with standards set forth in Weber, supra.

The policy behind Rule 23(e) stems from a need to protect the interests of those class members who are absent during settlement negotiations. The need to protect the absent class members, however is minimal in a case, such as here, where the only right of protection advanced in their behalf is one which this court rejected

in United Steelworkers v. Weber, supra. A district court cannot, under the guise of effectuating Rule 23(e), collaterally attack the holding and rationale of the Court's decision in Weber.

Insofar as the rights of third parties seeking protection under Rule 23(a) do not differ from those asserted by plaintiff Weber in United Steelworkers of America v. Weber, supra, Rule 23(a), as a matter of law, cannot be used to defeat the rights of private parties to institute an affirmative action plan which conforms to the requirements of the Court set forth in United Steelworkers of America v. Weber, supra. Such a rule of law is a necessary requirement if the proposed consent order is one which, like here, does not require the discharge of white workers, does not unnecessarily trammel upon the interest of white employees, is voluntarily adopted, is designed to eliminate traditional patterns of racial segregation and hierarchy, is temporary, is created to eliminate a manifest racial balance and not to maintain a racial balance, and does not require a percentage of black employees greater than that of blacks in the relevant labor force.

Petitioners' rights under Weber, supra, were thus denied as a result of the district court's rejection of the proposed decree on the basis of

the inclusion of an affirmative action plan within the decree. By rejecting the decree, the district Court therefore made a final determination of the parties' collateral right to settle the action in accordance with the decision in Weber.

This aspect of the case distinguishes it from Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978), which was relied upon by the Court of Appeals below. In Seigal, the Second Circuit held that a district court's disapproval of a settlement agreement in a stockholder's derivative action was not appealable as a collateral order.

Objections were raised in Siegal v. Merrick, supra, to the proposed settlement because of disagreements concerning the date on which the value of an option was measured and concerning the criteria by which the value of the option should be measured. These objections, however, were not, as here, contrary to legal principles enunciated by this Court. Rather, they were based upon concepts of fairness and equity which had not previously been definitively resolved by this Court. To this extent, therefore, the facts of Siegal v. Merrick, supra, are distinguishable from the facts of the present case.

The duty of the district court in Siegal v. Merrick, supra, was to determine, pursuant to Rule

23 whether the proposed settlement of the stockholder's derivative action was, in light of the objections made to it, fair and equitable. Although the district court below also had a duty to determine if the terms of the proposed consent decree were fair and equitable, it also had imposed upon it a duty to insure that its determination of what is fair and equitable was in accordance with the purposes of Title VII and with applicable legal principles determined by this Court. This Court's decision in Weber, supra, demonstrates that the district court below failed to satisfy this obligation.

These considerations show that the Second Circuit's decision in Siegal v. Merrick, supra, is inapplicable to the facts of this case. The opposing decision of the Ninth Circuit in Norman v. McKee, supra, in which the court held that orders refusing proposed settlements are appealable as collateral orders, states the better rule, especially in cases such as here where the basis for the order refusing the consent decree is based upon a violation of important, substantive interests which the Congress has sought to protect and maintain.

The second prong of the Cohen test requires that an order constitutes a final determination of

the collateral rights involved before an appeal under §1291 is allowed. The Court, however, has recognized that the determination of when a right has been finally decided and is thereby ripe for appeal under the collateral order doctrine, is not an exact science. In Dickinson v. Petroleum Conversion Corp., supra, 338 U.S. at 511, Mr. Justice Jackson emphasized that there was no set formula for determining the finality of a decree. The only reliable guide which the Court has found is the avoidance of any rigid insistence on technicality which conflicts with the purposes of §1291 and the collateral order doctrine. This approach requires a "practical" inquiry to determine if the nature and the effect of the district court's denial of the the settlement decree is such that review of the order cannot be postponed until the rendition of a final judgment in the action See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974); Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152 (1964).

One factor which bears on the finality of a collateral order is whether the issue requiring review will become moot if the review is delayed. Thus, for instance, the district court's order in Gardner v. Westinghouse Co., 437 U.S. 478, (1978)

denying class certification, was held not appealable precisely because effective relief could be provided even after final judgment on the merits of the action, if the prior denial of relief was shown to be in error. Id. 437 U.S. at 480. On the other hand, in Eisen v. Carlisle & Jacquelin, supra, the Court permitted an appeal of a district court's order which imposed 90% of the cost of giving notice to class members in a securities fraud case upon the defendant. Disallowance of the appeal would have made moot the collateral claim since it was the order which permitted the plaintiffs' suit to proceed as a class action. Id. 417 U.S. at 172.

In the present case, the district court's order deprived the parties of their right to remedy the effects of prior segregated job practices by invoking their rights under Weber, supra, and Title VII to settle the action voluntarily.

The tenor of the district court's opinion below tended to indicate that a final determination had been made. The opinion stated that the Court would enter a consent decree only when "the parties have settled their differences without a violation of the law and without violating the

right of any class member. 446 F. Supp. at 791. At another portion of the opinion, the district court claimed that "Preferential treatment on the basis of race - any race - violates the Constitution." 446 F. Supp. at 788. It also said that "the Court perceives no such vestiges" of discrimination." 446 F. Supp. at 790.

These findings and conclusions would, if left standing, utterly doom any possibility of a settlement. The parties' willingness to settle their differences is dependent, at any time, upon the prospects for ultimate victory then as well as the probable costs in money, resources, and time, of seeking such a victory.

The district judge, by stating that he perceived no evidence of discrimination by the defendants, created an incentive for defendants to go to trial to win the case. Once trial, however, had begun, there would be no way in which the parties, despite whatever might be done upon review of a final judgment, could retrieve the advantages which a settlement would have brought.

Moreover, the advantages of a particular settlement which was probable at one time would be forever lost. See Norman v. McKee, supra. Thus, the district court's order finally determined petitioners' collateral rights.

The third prong of the Cohen test requires that the interlocutory order must have an "irreparable" effect. This refers to the nature and the extent of the injury, such as whether it is destructive, substantial, continuing or irremedial. See, e.g., Osborne v. Missouri P.R. Co., 147 U.S. 248, 258 (1893); Brown v. Chote, 411 U.S. 452, 456 (1973). Also, however, as the Court has noted, "inadequacy of available remedies goes . . . to the existence of irreparable injury." United States v. American Friends Service Committee, 419 U.S. 7, 11 (1974). For the reasons previously mentioned, however, with respect to why the district court's order in this case was a final determination of petitioners' collateral rights, the order caused petitioners' irreparable injury. It was therefore appealable, pursuant to §1291, as a collateral order.

III

THE DISTRICT COURT'S ORDER BELOW IS APPEALABLE UNDER 28 U.S.C. §1292(a)(1) AS AN INTERLOCUTORY ORDER DENYING AN INJUNCTION

The second issue raised in this case concerns the appealability, under 28 U.S.C. §1292(a)(1), of a district court's order which denied, as a matter of law, a joint motion by the parties to settle the action in accordance with the terms of a proposed consent decree which granted a permanent injunction.

A. The Applicable Law

Section 1292(a)(1) of Title 28 of the United States Code provides for the appeal of certain interlocutory orders of the district courts.[12/]

12/ The appeal of interlocutory orders of federal district courts to the courts of appeals was first provided as a result of the enactment of the Evarts Act of 1891, 26 Stat. 826. As originally enacted, the Evarts Act authorized an interlocutory appeal only "where . . . an injunction shall be granted or continued." In a subsequent amendment to the Act in 1895, the jurisdiction of the court of appeals was extended to encompass appeals from orders of district courts refusing requests for injunctions. 28 Stat. 666. For a review of the history of interlocutory appeals in the federal curts, see Stewart-Warner Corp. v. Westinghouse Elec. Corp., 325 F.2d 822, 829-230 (2d Cir. 1963) (Friendly, J., dissenting), certiorari denied, 376 U.S. 11.

The statute grants jurisdiction to the United States Courts of Appeals over appeals from:

> (i)nterlocutory orders of the district courts of the United States, or of the judges thereof, granting continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court.

Since the enactment of 1292(a)(1), the courts have been plagued with problems concerning the statute's proper interpretation and application.[13/] The difficulties in interpreting and applying the statute have been compounded because of the fact that "(n)o discussion of the underlying reasons for

---

13/ See, e.g., Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935); Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942); Morgantown v. Royal Ins. Co., 337 U.S. 254 (1949); Switzerland Cheese Association, Inc. v. Horne's Market Inc., 385 U.S. 23 (1966). Generally, see Note, Appealability in the Federal Courts, 75 Harv. L. Rev. 351 (1952); Wright & Miller, Federal Practice and Procedure, §§3920, 3921-3924.

modifying the rule of finality appears in the legislative history" of §1292(a)(1).[14/] Baltimore Contractors v. Bodinger, 348 U.S. 176, 181 (1955).

This Court has found that the purposes of §1292(a)(1) can best be achieved if the appealability of an order is determined in accordance with the nature and the effect of the order,[15/] see Gardner

---

14/ Despite the lack of clear legislative history, it has been possible to conclude that the reasons for amending the statute spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable consequence. Baltimore Contractors v. Bodinger, supra, 348 U.S. at 181.

In Maxwell v. Enterprise Wall Paper Co., 131 F.2d 400, 402 (3rd Cir. 1942), the Third Circuit found, with respect to §1292(a)(1) that:

> The manifest purpose of the statute is to enable a litigant to seek prompt review in an appellate court from an order or decree which in most instances is effective upon its rendition and is drastic and far reaching in effect.

See also Morgenstern Chemical Co. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950).

15/ In Stewart-Warner Corp. v. Westinghouse Electric Corp., supra, the majority of the Court held that a dismissal of an intervenor's claims for injunctive relief alleged in a counterclaim

v. Westinghouse Broadcasting Co., supra, 437 U.S. at 480-481; Cohen v. Beneficial Industrial Loan Corp., supra, as measured by the impact it has upon the rights of the parties.

B. Criteria Governing The Application of §1292(a)(1)

1. General

In a series of decisions, the Court has narrowed the class of orders which are appealable under §1292(a)(1). The Court's decisions have allowed the appeal of an order pursuant to §1292 (a)(1) only when the order satisfied five basic criteria. First, the order must be interlocutory. See, Baltimore Contractors v. Bodinger, supra, 348 U.S. at 181; Switzerland Cheese Association v. E. Horne's Market, Inc., 385 U.S. 23 (1966). Second, the order must grant, deny, continue, modify or refuse to dissolve or modify, an injunction. See, 28 U.S.C. §1292(a)(1).

15/ (contd)
for patent infringement and unfair competition was appealable under 28 U.S.C. §1292(a)(1) even if the basis for dismissal rested upon a conclusion that the counterclaim improperly enlarged the action. Judge Friendly, dissenting, charged that the order was not appealable. As he saw it "(a)ppealability must turn on the nature of the order." 325 F.2d at 829.

Third, it must determine more than that the case should proceed to trial; see, Switzerland Cheese Association v. E. Horne's Market, Inc., supra, 385 U.S. at 25. Fourth, it must settle, or tentatively decide, an aspect of the merits of a party's claim for injunctive relief. See, Gardner v. Westinghouse Broadcasting Co., supra; 437 U.S. at 480-482. Fifth, it must cause a threat of serious, irreparable injury which can be alleviated only through allowance of an interlocutory appeal. Gardner v. Westinghouse Broadcasting Co., supra, 348 U.S. at 181.

2. Interlocutory Order

Interlocutory orders of a district court are orders rendered before final judgment which advance a case towards final judgment.[16/] See,

---

16/ Although this Court implied in its decision in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc, supra, that interlocutory orders are orders which "touch on the merits of the claim," 385 U.S. at 25, subsequent decisions of the Court as well as general principles, seem to indicate that the interlocutory nature of an order is separate from the issue of whether the order touches on the merits of the claim. See, e.g., Gardner v. Westinghouse Broadcasting Co. Also see Wright & Miller, Federal Practice and Procedure, §3924, pp. 72-73 (1977).

e.g., Baltimore v. Bodinger, supra, 348 U.S. at 183-184. Such interlocutory orders however, do not become appealable under the statute merely because they are "important, and may determine the outcome of the litigation." Morgantown v. Royal Ins. Corp.,. 337 U.S. 254, 258 (1949).

3. Injunctive Relief

Although §1292(a)(1) is applicable only to orders involving injunctive relief, see Wright & Miller, Federal Practice and Procedure, §3922 (1977), this Court has not determined what constitutes an injunction for the purposes of §1292 (a)(1). See, e.g., Baltimore Contractors v. Bodinger, supra, where the issue was "(w)hether in an action for accounting an interlocutory order denying a stay under Section 3 of the United States Arbitration Act should be regarded as a denial of an injunction from which an appeal lies." 348 U.S. at 177. See also, Shanferoke Coal & Supply Corp. v. Westchester Service Corp., 293 U.S. 449 (1935).

The Court has held, to be sure, that denials of requests for preliminary injunctions are covered by the statute. Baltimore Contractors v. Bodinger, supra, 348 U.S. at 182. See also,

George v. Victor Talking Machine Co., 293 U.S. 377 (1934). Uncertainty, however, exists over the extent to which §1292(a)(1) is applicable to requests for a permanent injunction.

For example, in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra, where it was held that the denial of plaintiffs' motion for summary judgment granting a permanent injunction was not an appealable order under §1292 (a)(1)[17/], the Court said:

> It is earnestly argued, however, that although this order denied a permanent injunction, it was nonetheless "interlocutory" within the meaning of §1292 (a)(1) because the motion for summary judgment did service for a motion for a preliminary injunction ... and that therefore "interlocutory" must also include a denial of a permanent injunction.
>
> We take the other view not because "interlocutory" or preliminary may not at times embrace denials of permanent injunctions, but for the reason that the denial of a motion for summary judgment because of unresolved issues of fact

---

17/ In dealing with the somewhat analogous provisions of 28 U.S.C. §1253, providing that:

> Except as otherwise provided by law, any party may appeal to the Supreme Court

> does not settle or even tentatively decide anything about the merits of the claim.

385 U.S. at 24-25. Thus, requests for permanent injunctions are not per se beyond the scope of application of §1292(a)(1).

Indeed, no such per se exclusion could be justified under the statute for the simple reason that an "(a)ppeal under §1292(a)(1) depends on the

---

17/ (contd)

> from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges,

this Court concluded that "the only interlocutory orders that we have power to review under that provision are orders granting or denying preliminary injunctions". Goldstein v. Cox, 396 U.S. 471 (1970).

The Court acknowledged, in Goldstein v. Cox, supra, that "(o)n its face, this language is subject to the construction that interlocutory orders denying permanent as well as preliminary injunctions can be appealed to this Court." 396 U.S. at 477. However, it nonetheless "conclude(d) that our jurisdiction over interlocutory orders under §1253 is confined to orders granting or denying a preliminary injunction." Id. at 478.

interlocutory nature of the order involved, rather than the interlocutory nature of the injunctive relief requested." Wright & Miller, Federal Practice and Procedures, supra, §§3924, p. 67.

Thus appeals under §1292(a)(1) can be made from interlocutory orders granting a permanent injunction. See W.L. Gore & Associates, Inc. v. Carlisle Corp., 529 F.2d 614 (3rd Cir. 1976). Indeed, this Court, in Smith v. Vulcan Iron Works, 165 U.S. 518 (1897), permitted an appeal from an

---

17/ (contd)
Despite the facile similarity between §1253 and §1292(a)(1) there are important differences between them. First, §1253 explicitly refers to permanent injunctions. Moreover, it explicitly mentions both permanent injunctions and interlocutory injunctions, thereby drawing a distinction between them. Second, §1253 expressly refers to interlocutory injunctions whereas §1292(a)(1) refers to interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions. Thus §1292(a)(1) is broader with respect to interlocutory orders. Moreover, it does not exclude interlocutory orders refusing permanent injunctions whereas §1253 does not include interlocutory orders refusing permanent injunctions. Thus, the decision in Goldstein v. Cox is inapplicable to the instant case.

interlocutory order granting a permanent injunction against patent infringement.

The issue in Smith v. Vulcan Iron Works, supra, one of the early cases construing and applying the Evarts Act, arose as follows: The district court rendered an order which permanently enjoined defendant from infringing the plaintiff's patent. Final judgment, however, was reserved pending the outcome of the district court's reference of the case to a master for an accounting. Defendant filed an appeal from the order granting the permanent injunction. This Court allowed the appeal.

The opinion of the Court reviewed the history of appeals of interlocutory orders granting injunctions in the English Court of Chancery, the House of Lords, and in the United States. It stated:

> But under the judicial system of the United States, from the beginning until the passage of the Act of 1891, establishing circuit courts of appeals, appeals from the circuit courts of the United States in equity or in admiralty, like writs of errors at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary

> application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause.

165 U.S. at 524. It concluded, however, that the American policy with respect to finality had been altered by the passage of the Evarts Act of 1891.

In particular, the court observed that §7 of the Evarts Act had, at that time, explicity provided that "where upon a hearing in equity ... an injunction shall be granted or continued by an interlocutory order or decree ... an appeal may be taken from such interlocutory order or decree granting or continuing such injunction." Id. at 524. Thus, the Court concluded that the Evarts Act contemplated the use of interlocutory orders to grant permanent injunctive relief. Accordingly, it allowed the appeal of an interlocutory order granting a permanent injunction.

The 1895 amendment to the Evarts Act provided for an appeal of a denial of an injunction in all cases in which an appeal would be permitted for the granting of an injunction. Thus, in some instances, it is possible, under the holding in

Smith v. Vulcan Iron Works, supra, to appeal an interlocutory order granting a permanent injunction. Whether the appeal will be allowed depends, of course, upon the extent to which the order is interlocutory and operates, in practice, to preclude the granting of injunctive relief.

4. Characteristics of An Injunction

a. More Than a Mere Pre-trial Order

In order to constitute an order granting or denying injunctive relief, an interlocutory order must, under §1292(a)(1), be more than a "pretrial order that decides only one thing -- that the case should go to trial", Switzerland Cheese Association v. E. Horne's Market, supra, 385 U.S. at 25, or an order which is only "a step in controlling the litigation before the trial court." Baltimore Contractors v. Bodinger, supra, 348 U.S. at 185. If these conditions, are not met, then it is unlikely that there will be a need for critical examination and re-examination of the issue by the cumbersome method of appeal prior to final adjudication of the action. See, Peter Pan Fabrics, Inc. v. Dixon Textile Corp., 280 F.2d 805 (2d Cir. 1960)(Judge Clark, dissenting).

b. Determining the merits

Orders addressed to a party which "touch on the merits of the claim" of the party, are less likely, under §1292(a)(1), to be deemed mere pre-trial orders. Switzerland Cheese Association v. E. Horne's Market, supra, 385 U.S. at 25. In general, it can be presumed that interlocutory orders which "affect the merits of petitioner's own claim," Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 480-481 or which have a "direct or irreparable impact on the merits of the controversy", Id. at 482, will fall under §1292(a)(1), especially if they also "pass on the legal sufficiency of any claims for injunctive relief." Id. at 481.

Thus, a major factor effecting appealability under §1292(a)(1) is the extent to which the order being appealed has the effect of determining the legal sufficiency of a claim for injunctive relief. Put another way, the critical issue becomes whether the order denies appellant "the protection of the injunction prayed." General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430, 433 (1932).

Many interlocutory orders involving a permanent injunction will not meet this criteria. For example, an order denying a motion for summary judgment to grant a permanent injunction will not generally satisfy the criteria, see, e.g., Switzerland Cheese Association v. E. Horne's Market, Inc., supra, since it will not in general, preclude the filing of a subsequent motion for a preliminary injunction.[18/] See, Chappell & Co. v.

18/ The earliest rationale for disallowing an appeal of an order denying a motion for summary judgment granting an injunction was set forth by Judge Hastie in Morgenstern Chemical Co. Inc. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950).

The action there was brought by plaintiff to enjoin defendant's continued use of a trade-mark. The district court denied plaintiff's motion for a summary judgment granting a permanent injunction. Plaintiff appealed from the interlocutory order. In rejecting the appeal, Judge Hastie stated that

> ... so far as we have been able to determine, appeals from refusals of injunctions have been in cases where the merits of the applications for injunctive relief had been passed upon in the trial courts ....

Frankel, supra, 367 F.2d 197, 203 (2d. Cir. 1966).

To the extent that an order denying a motion for summary judgment is only a denial of a request for acceleration of the trial process and is not a rejection of the legal sufficiency of the injunctive claim, then the order is not a refusal of an injunction and it is consequently not appealable under §1292 (a)(1).

18/ (contd.)

> The denial of summary judgment in the court below has no comparable significance. The court has not reached, much less decided, the merits of plaintiff's claim for injunction .... Nothing has occurred in or as a result of the denial of the motion which precludes plaintiff from seeking a temporary injunction in accordance with established procedure if he believes immediate injunctive relief is necessary and proper. Plaintiff is merely relegated to the normal procedure of trial which would have been the only procedure before the adoption of Rule 56 .... In character and impact the court's action was not greatly different from an order continuing a cause already calendered for trial until some future date in order that additional witnesses may be called.

181 F.2d at 162.

This analysis is consistent with the decision of the Court in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra, since the denial there of the motion for summary judgment granting a permanent injunction was based upon the ground that there existed genuine issues of facts which were in dispute. Thus, the denial of the motion was a rejection of a request for acceleration of the adjudicatory process. It did not decide anything about the merits of the claim for injunctive relief. The question in every case, it seems, is the effect of the denial and the grounds for it. See, e.g., Safe Flight Instrument Corp. v. McDonnel-Douglas Corp., 482 F.2d 1086, 1093 (9th Cir. 1973), certiorari denied 414 U.S. 1113.

More specifically, the relevant distinction appears to be between an order whose purpose, or effect, is to deny injunctive relief and an order whose purpose, or effect, will not preclude a subsequent grant of similar injunctive relief[19/]

19/ This is perhaps the distinction which this Court sought to invoke in Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 481, n.7, when it quoted from Judge Friendly's dissenting

The grounds given in support of the order can, in part, thus be used to determine if the order effectively bars, as a practical matter, a subsequent claim on the merits for similar injunctive

---

19/ (contd.)
opinion in Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F.2d 822, 829 (2d Cir. 1963). Judge Friendly, in opposing the court's allowance of an appeal from an order which had dismissed intervenor's counterclaims for injunctive relief on the ground that they would unduly enlarge the scope of the action, stated that

> "Appealability must turn on the nature of the order ... The distinction ... was between a 'refusal' based on an allegedly erroneous conclusion that the law does not permit the claim for an injunction to be heard in the action ... and one based on alleged abuse of a discretionary power over the scope of the action. Where the order is of the former type, the danger of serious harm from the court's erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction has been thought to outweigh the general undesirability of interlocutory appeals. The very fact that the second type of order hinges on the trial court's discretion is itself an indication that such orders, relating primarily to convenience in litigation, carry a lesser threat of harm.

relief. If such relief is barred and the order also causes irreparable injury, then it is appealable under §1292(a)(1).

5. Irreparable Injury

In Sampson v. Murray, 416 U.S. 61 (1974) the Court recognized that "the possibility that adequate compensatory or other corrective relief will be available at a later date, ... weighs heavily against a claim of irreparable harm." 416 U.S. at 90, quoting Virginia Petroleum Jobbers Assn. v. FPC, 259 F.2d 921, 925 (D.C.Cir. 1958). The existence of irreparable injury under §1292(a)(1) may therefore be shown by demonstrating that there is no adequate remedy for the appellant's substantial injury other than by allowing an interlocutory appeal.

C. Application of the Criteria Under §1292(a)(1)

Unquestionably, the order of the district court below denying approval of the proposed consent decree granting a permanent injunction was an interlocutory order denying an injunction within the meaning of §1292(a)(1). The proposed decree

included an express request for a permanent injunction enjoining defendants from discriminating against petitioners and class members, and enjoining them to take certain affirmative steps to correct the effects of the discrimination.[20/]

20/ These steps included the following:

> (1) instituting new rules and procedures, as set forth in the proposed decree, for determining seniority, or eligibility, for vacations, promotions, demotions, lay-offs, and recalls;
>
> (2) providing medical and sick benefits, upon transfer to regular employment, to certain employees who served their probationary period as a seasonal employee;
>
> (3) providing, under certain circumstances, a preference for hourly paid seasonal production employees to fill vacancies arising in the hourly paid permanent production job classification;
>
> (4) granting hourly paid seasonal production employees a preference for filling vacancies in the job classification of Watchman; and
>
> (5) filling by December 31, 1980, the production supervisory positions of foreman and assistant foreman with qualified blacks until the percentage of blacks in the position equals one-third of the total.

Joint Appendix at 27a-28a.

The order of the district court satisfies the specific requirement under §1292(a)(1) that the order must touch on the merits of petitioners' claim. In fact, the grounds assigned by the district court in support of its order clearly indicate that it determined simultaneously the sufficiency of the injunctive claim and the merits of the action.

For example, the district court, in its opinion, specifically held that "racial preferences are forbidden in this nation." 446 F.Supp. at 770. This holding undermined the claim for injunctive relief. In another portion of the opinion, the district court concluded that the "proposed consent decree herein, rather than aiding victims of violations of the law, would itself violate the law and victimize innocent people both black and white." Id. This conclusion also undermined the injunctive claim.

The district court also critized the proposed consent decree on the ground that "there was no apparent consideration given to whether or not the preferred employees have been, are, or would be subject to racial discrimination. 446 F.Supp. at 789. This assessment undermined both the claim

under Title VII and the claim for injunctive relief. Similarly, the court's finding that the beneficial aspects of the decree were not limited to "victims of racial discrimination", Id. at 789, and the finding that there were no vestiges of discrimination upon which the proposed decree could be supported as a measure to overcome the effects of discrimination, Id. at 790, tended to erode the basis for any recovery by petitioners on their Title VII claims.

The grounds assigned by the district court in rejection of the proposed settlement decree thus determined the merits of the injunctive claims and the merits of the action. As a matter of law, these claims were found to be legally insufficient. Moreover, the alleged legal insufficiency of the claims was the sole basis for rejection of the proposed settlement decree.

Necessarily, the the grounds specified by the district court for rejection of the decree precluded a subsequent motion by petitioners for a preliminary injunction granting all, or part, of the relief specified in the proposed consent decree. To obtain a preliminary injunction, the petitioners are required to demonstrate the existence of a substantial likelihood that they

will ultimately prevail on the merits. See Sampson v. Murray, 416 U.S. 61 (1974).

Given the findings and conclusions of the district court, however, it is clear that petitioners could not have made such a showing, with respect to any of the relief specified in the proposed decree, to the satisfaction of the district court, and therefore could not have obtained a preliminary injunction. See Chappel & Co. v. Frankel, supra, 367 F.2d at 203. Also see Morgenstern Chemical Co. v. Schering Corp., supra, 181 F.2d at 162. Thus, the nature and the effect of the district court's interlocutory decree was to deny petitioners "the protection of the injunction prayed". General Electric Co. v. Marvel Rare Metals Co., supra, 287 U.S. at 433.

The district court's findings and conclusions on the merits of the request for a final injunction also necessarily determined the merits of petitioners' Title VII action. For petitioners to prevail on their Title VII claims, they were required to show that defendants had committed discriminatory actions in violation of Title VII, that petitioners were victims of the discrimination, and that the scope of the relief requested

was commensurate with the scope of the injury which defendants had caused through their discriminatory practices. See Teamsters v. United States, 431 U.S. 324 (1977). The district court, however, decided against petitioners on each of these three issues, 446 F. Supp. at 788-791, thereby foreshadowing ultimate defeat, on the merits, of petitioners' Title VII claims.

In short, the effect of the interlocutory order below was to "pass on the legal sufficiency of . . . (the) claims for injunctive relief", Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at 481, and thereby to settle, or tentatively decide, the petitioners' claims on the merits. See Switzerland Cheese Association v. E. Horne's Market, supra, 385 U.S. at 24. It therefore satisfied the essential prerequisite for appealability under §1292(a)(1).21/

21/ It should, perhaps, be noted that petitioners' argument that the district court's order below is simultaneously appealable as a collateral order and as an order refusing an injunction does not involve an inconsistency. Although the appealability of a collateral order is premised

This analysis shows that the court of appeals below had no basis, in fact or law, for holding that "(h)ere, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings". 606 F.2d at 423.

21/ Cont.

upon a showing that the order finally determines rights which are separate and independent of the merits, and the appealablity of an order refusing an injunction is based upon a demonstration that the order touches on or resolves the merits, the two apparently inconsistent positions are easily reconcilable.

With respect to the appealability of the order below as a collateral order, the right affected is the parties' right to settle the case, prior to trial, in accordance with standards set forth in Weber, supra. This right is, of course, separate and independent of the right sued upon pursuant to Title VII.

On the other hand, the right affected with respect to the refusal of an injunction concerns petitioners' right under Title VII as well as the parties' right to institute an affimative action plan. The former, of course, is exactly the right sued upon and therefore an order adversely affecting it touches on the merits of the action.

Thus, the two positions are consistent with one another since they involve different rights.

In making this holding, the Fourth Circuit assumed that the facts here were analogous to those in Liberty Mutual Insurance Co. V. Wetzel, 424 U.S. 737 (1976); Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra; and Gardner v. Westinghouse Broadcasting Co., supra. These cases, however, are inapposite.

In Liberty Mutual Insurance Co. v.Wetzel, supra, where the issue was the appealability of an interlocutory order determining liability but reserving decision on the nature and extent of the relief to be granted, this Court held §1292 (a)(1) inapplicable because "there was no denial of any injunction sought by petitioner". 424 U.S. at 745. By contrast, the petitioners in this action sought an injunction which was denied on the merits.

The decision in Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc., supra, is clearly distinguishable from the present case since the existence there of facts in dispute rendered premature any determination on the merits of the injunctive claim. Moreover, the decision there, unlike the one here, did not preclude the filing of a subsequent motion for a preliminary injunction.

In Gardner v. Westinghouse Broadcasting Co., supra, the issue was the appealability of a denial of class certification. As the court pointed out there, the order neither denied injunctive relief nor determined the merits of actions. It simply determined the range of persons who could benefit from the judgment or who would be bound by it. Also, it did not preclude an attempt by any party to file a request for a preliminary injunction. Here, however, an injunction was denied on the grounds of its legal sufficiency. Those grounds were sufficient to bar, on the merits, any later effort to request a preliminary injunction. None of these cases therefore supported the holding below of the court of appeals.

In addition to its purported reliance upon the decisions of this Court, the court of appeals found the facts of the present case to be analogous to the facts in Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978), in which the Second Circuit held that a district court's disapproval of a settlement in a stockbroker's derivative action was not appealable. Adopting the rationale of the court in Seigal v. Merrick, supra, the Fourth

Circuit held that the disallowance of appeals from a refusal to enter a settlement had the "practical effect of enhancing the district court's control over the litigation." 606 F.2d at 423. It then quoted from Seigal the statement that

> (T)he denial of one compromise does not necessarily mean that a "sweetened" compromise may not be approved. The management of a derivative suit gives the trial judge a chance not only to disapprove a compromise but to edge the parties toward more equitable terms.

Id. at 423-424, quoting Seigal v. Merrick, supra, 590 F.2d at 39. On this basis it concluded that "(w)hatever the district court's reasons for refusing a decree, appeals of right . . . would encourage an endless string of appeals and destroy the district court's supervision of the action". 606 F.2d at 424.

For several reasons, the decision in Seigal v. Merrick, cannot be deemed dispositive of the issue presented here. First, the decision in Seigal was based upon §1291, not §1292(a)(1). Second, the appellant in Seigal had not been denied a request

for injunctive relief. Third, the district court's denial there of the proposed settlement had been based upon its assessment of the fairness of the settlement as determined by the date on which the value of an option was to be measured and by whether the value of the option was to be measured entirely by market considerations.

As a result of this posture of the case, the Second Circuit, as evidenced from its quotation of the admonition in Cooper & Lybrand v. Livesay, supra, 437 U.S. at 477, that "allowing appeals of rights from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process", seemed to have regarded the district court's order as turning esssentially upon a factual assessment rather than a legal assessment.

In the instant action, however, the order of the district court was based entirely upon its misapprehension of applicable legal principles. The order thus fell in the category of cases in which the district court has an "erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction". Gardner v. Westinghouse Broadcasting Co., supra, 437 U.S. at

481, n.7. In such a case, the danger of serious harm resulting from a disallowance of an appeal "outweigh(s) the general undesirability of interlocutory appeals". Id.

As mentioned previously, the Fourth Circuit assumed that the decision of the district court would not prevent the emergence of a more "sweetened" compromise. This assumption, however, was directly contrary to the explicit statement of the district court that

> "When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order . . . . But this Court will not, by entering the proposed Consent Decree provide the parties with a judicial licence to practice racial discrimination."

446 F.Supp. at 791.

In view of this conclusion of the district court, it was plain error for the Fourth Circuit to assume that the parties would be able to come up with a more sweetened compromise that would be satisfactory to the district court while simultaneously protective of petitioners'

interest in eradicating the adverse effects of segregated job classifications. For these reasons, the decision in Seigal v. Merrick is irrelevant to the present case.[22/]

In short, the decision below, whatever may be the general status of the appealability of orders refusing to approve proposed consent decrees or refusing to grant a permanent injunction, is an order which, as a practical matter, denied injunctive relief to petitioners on the ground that their claim was legally insufficient.

The Fourth Circuit also held that the consequence of the order did not produce any irreparable harm and that delayed review would not forfeit any of petitioners' rights. 606 F.2d at 423. This erroneous holding was based on a total misconception of the nature and effect of the district court's order. It ignores the parties'

22/ The rationale and the holding in Seigal are directly contrary to the rationale and holding of the Ninth Circuit in Norman v. Mckee, 431 F.2d 769 (9th Cir. 1970) cert. denied, 401 U.S. 912 (1971)

loss of the opportunity to settle the case on the same basis which this Court permitted the union and the employer to settle claims of discrimination against them in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

The race-conscious affirmative action plan which this Court approved in Weber, supra, was the result of voluntary action taken by Kaiser Aluminum & Chemical Corp., and the United Steelworkers of America, AFL-CIO-CLC. It was, as is true here, designed to "break down old patterns of racial segregation and hierarchy", 443 U.S. at 208, and to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[23/] Id.

That affirmative action program, like the one here, did not "unnecessarily trammel the interests of white employees". Id. Like the present plan, it was a temporary effort intended to eliminate racial imbalance, and not to maintain racial balance. Private affirmative action plan satisfying

---

23/ These comments were taken from the remarks of Senator Hubert Humphrey, 110 Cong. Rec. 6548.

balance. Private affirmative action plan satisfying these criteria can, under Weber, supra, be put into place without fear of unncessary judicial intervention on behalf of third parties who claim rights denied by the Court in Weber, supra. Judicial action resulting in the deprivation of this right constitutes irreparable injury for which petitioners have no other means of obtaining redress other than by taking an interlocutory appeal.

Moreover, it is evident that, if petitioners are forced to go to trial, the right to settle the case before trial will be irretrievably lost. As a consequence, petitioners will be compelled to undergo the burdens of an unnecessary, expensive, and time-consuming trial. Furthermore, such a trial is likely to be disruptive to the preservation of industrial peace and tranquility in the workplace. This is an interest which the Congress, by expressing a preference for voluntary settlements, see Alexander v. Gardner-Denver Co., supra, 415 U.S. at 44, was obviously seeking to foster.

The order of the district court threatens these vital interests. Its direct effect is to force petitioners to yield rights granted under

this Court's decision in Weber, supra. It thus causes irreparable injury to petitioners and class members. The allowance of an appeal from the district court's order is the only means available for ameliorating the damage caused by the order. Petitioners' appeal therefore should not be dismissed.

CONCLUSION

For the reasons indicated herein the decision below should be vacated with instructions to allow the appeal.

Respectfully submitted,

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
Hall, Tucker & Marsh
214 East Clay Street
P.O. Box 27363
Richmond, Virginia 23261
Tel: (804) 648-9073

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401
Tel: (703) 371-3700

JACK GREENBERG
Counsel of Record
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
10 Columbus Circle
Suite 2030
New York, New York 10019
Tel: (212) 586-8397

BARRY L. GOLDSTEIN
806 15th Street, N.W.
Suite 940
Washington, D.C. 20006
Tel: (202) 638-3278

Counsel for Petitioners

Supreme Court, U.S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1236

In The

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, AND STUART E. MINES,

Petitioners,

vs.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN BRANDS, INC.

HENRY T. WICKHAM
D. EUGENE WEBB, JR.
ROBERT D. SEABOLT
MAYS, VALENTINE, DAVENPORT & MOORE
23rd Floor, F&M Center
P. O. Box 1122
Richmond, Virginia 23208
804-644-6011

PAUL G. PENNOYER, JR.
BERNARD W. McCARTHY
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE & WOLFF
30 Rockefeller Plaza
New York, New York 10112
212-541-5800

Counsel for American Brands, Inc.

QUESTION PRESENTED

Whether the District Court's order refusing to enter a proposed consent decree is an appealable interlocutory order under either 28 U.S.C. § 1291 or § 1292(a)(1).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. The District Court's Order Refusing Entry of a Proposed Consent Decree Is Not Appealable Under the Judicially Created Collateral Order Exception to 28 U.S.C. § 1291 .. 8

A. The order did not conclusively determine the disputed question 10

B. The order did not resolve an important issue completely separate from the merits 12

C. The order is not effectively unreviewable 18

D. The Ninth Circuit's reasoning in *Norman* v. *McKee is* not persuasive 23

II. The District Court's Order Refusing Entry of the Consent Decree Is Not Appealable Under the Congressionally Created Exception to the Finality Rule, 28 U.S.C. § 1292 (a)(1) 26

A. As a narrow exception to the final judgment rule, section 1292(a)(1) should be strictly construed 26

B. The rejection of the tendered consent decree did not cause irreparable consequences which can be alleviated only through allowance of interlocutory appeal 28

1. The order could be reviewed both prior to and after final judgment 28

Page

2. The order did not affect or pass on the legal sufficiency of any claims for injunctive relief..... 31

3. The Fifth Circuit *City of Alexandria* case was wrongly decided 36

C. The burden on the judicial system from allowing interlocutory appeals from orders rejecting consent decrees outweighs any consequences of postponing judicial review 39

CONCLUSION 42

TABLE OF AUTHORITIES

Cases

Page

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970) 9

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 16

Autera v. *Robinson*, 419 F.2d 1197 (D.C. Cir. 1969) 17

Axinn & Sons Lumber Co. v. *Long Island Rail Road Co.*, No. 79-3082 slip op. (2d Cir., August 11, 1980) 20

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955) 26, 27, 33, 41

Carson v. *American Brands, Inc.*, 446 F. Supp. 780 (E.D. Va. 1977) .....*passim*

Carson v. *American Brands, Inc.*, 606 F.2d 420 (4th Cir. 1979), *cert. granted*, — U.S. —, 100 S.Ct. 1643 (1980)..*passim*

City of Morgantown, W. Va. v. *Royal Insurance Co.*, 337 U.S. 254 (1949) 27, 35

Cobbledick v. *United States*, 309 U.S. 323 (1940) 9

Page

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 9, 11, 14, 32

Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978) ..... *passim*

Dent v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969) 16

Dickinson v. *Petroleum Conversion Corp.*, 338 U.S. 507 (1950) 22

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) 8, 11

Emporium Capwell Co. v. *Western Addition Community Organization*, 420 U.S. 50 (1975) 17

Flinn v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976) 14, 34

Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) ..... *passim*

General Electric Co. v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932) 31, 36

In re General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106 (7th Cir. 1979) 25

In re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973) 14

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 5, 38

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) .. 14

Myers v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. denied sub nom., Local 741 International Brotherhood of Electrical Workers* v. *Myers*, 434 U.S. 801 (1977) 37

Norman v. *McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) 23, 24, 25, 26

Page

Peter Pan Fabrics, Inc. v. *Dixon Textile Corp.*, 280 F.2d 800 (2d Cir. 1960) 40

Rodgers v. *U.S. Steel Corp.*, 541 F.2d 365 (3d Cir. 1976) ...20, 30

Ruiz v. *Estelle*, 609 F.2d 118 (5th Cir. 1980) 20, 30

Russell v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975) 5

Sampson v. *Murray*, 416 U.S. 61 (1974) 28

Sagers v. *Yellow Freight Systems, Inc.*, 529 F.2d 721 (5th Cir. 1976) 38

Seigal v. *Merrick*, 590 F.2d 35 (2d Cir. 1978) 3, 10, 14, 23, 25, 29

Shelley v. *Kraemer*, 344 U.S. 1 (1947) 14

Speed Shore Corp. v. *Denda*, 605 F.2d 469 (9th Cir. 1979).... 17

Stateside Machinery Co. v. *Alperin*, 526 F.2d 480 (3d Cir. 1975) 38

Switzerland Cheese Association, Inc. v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966) 27, 35

Tacon v. *Arizona*, 410 U.S. 351 (1973)..... 9

United Founders Life Insurance Co. v. *Consumers National Life Insurance Co.*, 447 F.2d 647 (7th Cir. 1971)..... 14

United States v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980) 27, 36

United States v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), *vacated and remanded on other grounds sub nom., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977) 38

United Steelworkers of America, AFL-CIO-CLC v. *Weber*, 443 U.S. 193 (1979) .....*passim*

Virginia Petroleum Jobbers Association v. *Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958)..... 28

Page

W. J. Perryman & Co. v. *Penn Mutual Fire Insurance Co.*, 324 F.2d 791 (5th Cir. 1963) 17

West Virginia v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub. nom., Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971) 14

Williams v. *First National Bank*, 216 U.S. 582 (1910) 17

Statutes

28 U.S.C. § 1291 ..... *passim*

28 U.S.C. § 1292(a)(1) ..... *passim*

28 U.S.C. § 1292(b) 20, 26, 30

28 U.S.C. § 1651 20

42 U.S.C. § 1981 2

Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ..... *passim*

Rules

Fed. R. Civ. P. 23(e) 14, 15, 28, 29

Fed. R. App. P. 21(a) 20

Fed. R. App. P. 41 4

Treatise

16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *Federal Practice and Procedure*, § 3924 (1977) 38

No. 79-1236

In The

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, AND STUART E. MINES,

Petitioners,

vs.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT AMERICAN BRANDS, INC.

STATEMENT OF THE CASE

Petitioners Frank L. Carson, Lawrence Hatcher and Stuart E. Mines filed this action against respondents American Brands, Inc. t/a The American Tobacco Company ("American"), Local 182, Tobacco Workers International Union, and Tobacco Workers International Union on October 24, 1975, in the United States District Court for the Eastern District of Virginia, Richmond Division. Petitioners brought the suit on behalf of themselves and an alleged

class consisting of "all black persons who have sought employment and who are employed or might in the future be employed by the Company's [American's] Richmond Leaf Department. . . ." They alleged violations by respondents of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") and of 42 U.S.C. § 1981 (J.A. la-12a). In their respective answers, respondents denied any violation of the cited statutes (J.A. 13a-23a).

On January 27, 1976, at a pre-trial conference, an order was entered by the District Court allowing time for discovery and setting the case for trial to begin on May 2, 1977. By letter dated March 25, 1977, counsel for petitioners informed the Court that the parties would present a consent decree at the final pre-trial conference on April 1, 1977, and that they wished to discuss the entry of the proposed decree at that conference.

During the course of the April 1 conference, the Court expressed concern about the effect of the proposed decree on individuals other than the parties before the Court and questioned whether certain provisions of the tendered decree might be violative of the law. The District Court noted that the parties were jointly seeking entry of the decree and to that extent were no longer in an adversary posture, and requested that the parties submit memoranda in support of entry.

After receiving the requested memoranda, the Court, by order dated June 1, 1977, declined to enter the tendered decree. *Carson* v. *American Brands, Inc.*, 446 F. Supp. 780 (E.D. Va. 1977). On June 24, 1977, petitioners filed a notice of appeal from the order to the Court of Appeals for the Fourth Circuit (J.A. 57a-58a).

By order dated October 12, 1977, the Court of Appeals established a briefing schedule. However, on January 10,

1978, before briefs were due, respondents informed the clerk of the Court of Appeals that they had no position on the merits of the appeal and that the appeal was not an adversary proceeding as required by Article III of the United States Constitution. Respondents stated that under these circumstances, they would not submit briefs unless so ordered by the Court (J.A. 59a-60a).

Petitioners then filed a motion in the Court of Appeals for summary reversal of the District Court's order, and the Court of Appeals ordered respondents to brief a position in opposition to the motion for summary reversal. The brief was submitted and the Court of Appeals denied petitioners' motion by order entered on January 31, 1978, an order which was rescinded on February 8, 1978. On March 27, 1978, the Court of Appeals again denied the motion for summary reversal and directed the clerk to invite respondents to file a brief addressing the merits of the appeal (J.A. 62a-64a).

A panel of the Court of Appeals heard oral argument on October 3, 1978. While the matter was under advisement, the clerk informed the parties by letter dated January 25, 1979, of the panel's concern as to whether it had jurisdiction to entertain the appeal in light of a recent opinion, *Seigal* v. *Merrick,* 590 F.2d 35 (2d Cir. 1978), and requested that counsel file supplemental memoranda addressing this concern by February 9 (J.A. 65a-66a). After the filing of the requested memoranda, the Court of Appeals, *sua sponte,* agreed to *en banc* consideration of the case without oral argument on June 5, 1979.

On September 14, 1979, the Court of Appeals, three judges dissenting, dismissed the appeal holding that the District Court's refusal to enter the proposed consent decree was not an appealable order under 28 U.S.C. § 1292(a)

(1). *Carson* v. *American Brands, Inc.*, 606 F.2d 420, 425 (4th Cir. 1979). The mandate of the Court of Appeals issued on October 5, 1979, in accordance with Fed. R. App. P. 41. Petitioners made no attempt to obtain a stay of the mandate.

After informing petitioners' counsel by letter that respondents no longer consented to the entry of the proposed decree, the respondents, by motion filed with the District Court on October 10, 1979, requested the Court to hold a pre-trial conference for the purpose of establishing a new trial date. In the motion, respondents stated that they no longer consented to the entry of the proposed decree (J.A. 67a-68a). Petitioners filed no response to this motion, nor did they at any time lodge an objection to respondents' withdrawal of consent with either the Court or counsel.[1]

By notice dated November 2, 1979, the parties were advised that the case had again been placed on the docket for trial (J.A. 69a-70a), and at a pre-trial conference on November 15, 1979, the District Court set the case for trial to begin on February 4, 1980. Petitioners made no objection.

Two weeks after the conference at which the case was set for trial, respondents were served with petitioners' application for an extension of time in which to file a petition for writ of certiorari. On December 5, 1979, petitioners moved

---

[1] Respondents suggested in their Brief in Opposition to Petition for Writ of Certiorari that there was no "case or controversy" within the meaning of Article III of the United States Constitution and that the issue on this appeal should be considered moot in view of respondents' withdrawal of consent to the proposed decree, which occurred without objection by petitioners when the case was back before the District Court for the first time in 28 months, there having been no stay of the mandate (Resp. Br. in Opp. at 4-10). Certiorari having been granted, American will brief here only the merits of the issue on appeal.

the District Court for a stay of all further proceedings pending disposition of their petition. The District Court granted this request by order dated December 17, 1979.

This Court granted the petition for writ of certiorari on June 16, 1980, and expressly limited the appeal to the question of whether an order refusing to enter a proposed consent decree is an appealable order under 28 U.S.C. § 1291 or § 1292(a)(1).[2]

SUMMARY OF ARGUMENT

I.

The finality requirement of 28 U.S.C. § 1291 represents a legislative judgment that a succession of separate appeals from interlocutory orders would have a debilitating effect on judicial administration. The District Court's order rejecting a proposed consent decree does not come within the small class of exceptions to the final judgment rule established by the judicially-created "collateral order" doctrine.

---

[2] Petitioners' Statement of the Case (Pet. Br. at 5-21) contains few citations to the joint appendix or record in the case to support their factual allegations, particularly with respect to the description of employment practices and policies at American's Richmond Leaf Plant. Petitioners' description of such practices and policies is largely inaccurate, but those practices and policies are not relevant to the limited issue of appealability before this Court.

American is compelled to comment on petitioners' referring the Court to *Russell* v. *American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975), for a description of "the operation of the American Tobacco Company" (Pet. Br. at 8 n.1). The *Russell* case has no relevance here whatsoever. First, the merits of American's operations are not at issue on this appeal. Second, even if the merits were at issue, the *Russell* case concerns an entirely different facility, in a different state, and thus the facts stated in *Russell* (not part of the record in this case) are irrelevant. Moreover, the *Russell* action is presently pending in the Middle District of North Carolina on reconsideration in light of *International Bhd. of Teamsters* v. *United States,* 431 U.S. 324 (1977), and other recent Supreme Court cases.

The District Court's order does not satisfy any element of this Court's three-part collateral order test. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978). First, the order did not conclusively determine any disputed question. Even assuming that there is a general right to settle litigation, nothing in the District Court's order precluded settlement at another time by the tendered decree or some alternative consent decree.

Second, the District Court's order did not resolve an important issue completely separate from the merits. Petitioners contend that the important collateral issue is the right to settle a Title VII class action under *Weber* (*United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979)). The *Weber* opinion, however, was delivered two years after the District Court's order, was not considered by the courts below, and is encompassed within the questions denied review by the Court in this case. Even assuming that *Weber* is applicable to settlement of litigation, the District Court's order in this case of necessity involved considerations that were enmeshed in the factual and legal issues comprising petitioners' claims, and so no "collateral" rights were injured by the District Court's order. Furthermore, the importance of the right to settle Title VII actions is no different from the right to settle any other litigation, and there is no reason for creating a special exception to the final judgment rule for Title VII cases.

Third, the District Court's order is effectively reviewable, both before and after possible trial, and therefore fails to satisfy the final prong of the collateral order test. The same or alternative consent decree proposals could be presented by the parties for the District Court's consideration at any stage of the litigation. If none are accepted and the

parties go to trial, any party could advocate on appeal therefrom the settlement alternative most favorable to its position. In situations where actual final determinations are made to the detriment of legitimate rights, immediate appellate review is available through certification or mandamus. In sum, no irreparable harm would flow from a decision holding the collateral order doctrine inapplicable and postponing appellate review until final judgment.

II.

28 U.S.C. § 1292(a)(1), the statutory exception to the rule of finality held by the Court of Appeals below to be inapplicable to the District Court's order rejecting a proposed consent decree, has always received a narrow interpretation by this Court. Postponing appellate review in this case presents no serious, irreparable consequences such as would warrant expansion of § 1292(a)(1).

After rejection of the tendered decree, petitioners remained fully able to obtain injunctive relief through alternative settlement proposals, a motion for injunctive relief, an award of injunctive relief following trial, or through imposition of such relief on appeal. Nothing in the opinions of the courts below foreclosed any of these opportunities to seek and obtain injunctive relief. The District Court's order thus produced no irreparable effect because it could be reviewed both prior to and after final judgment. *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

Denial of entry caused no serious or irreparable harm for the further reason that it did not dispose of any claims for injunctive relief. The District Court may have expressed an opinion concerning the lawfulness of the tendered decree, but it did not pass on the legal sufficiency of petitioners'

claims for injunctive relief in any other form and under any other factual circumstances.

The narrow interpretation accorded § 1292(a)(1) by this Court has often followed from weighing the consequences of postponing appeal against the vital judicial interests militating against piecemeal review. The result urged here by petitioners would create the potential for multiple and unnecessary appeals, injecting appellate courts indiscriminately into the trial process. The consequences of postponing appeal of an order rejecting a consent decree, on the other hand, are minimal and remediable both prior to and after final judgment.

ARGUMENT

I.

The District Court's Order Refusing Entry Of A Proposed Consent Decree Is Not Appealable Under The Judicially Created "Collateral Order" Exception To 28 U.S.C. § 1291

The finality requirement of 28 U.S.C. § 1291[3] embodies a long-standing legislative judgment that " '[r]estricting appellate review to 'final decisions' prevents the debilitating effect on judicial administration caused by piecemeal appeal disposition of what is, in practical consequence, but a single controversy.' " *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 471 (1978), quoting from *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 170 (1974). The policy of finality serves to avoid the "obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litiga-

[3] 28 U.S.C. § 1291 permits appellate review only from "final decisions of the district courts of the United States," except where a direct review may be had in the Supreme Court.

tion may give rise." *Cobbledick* v. *United States,* 309 U.S. 323, 325 (1940).

No one here contends that the District Court's order refusing to enter a proposed consent decree was a "final decision" within the literal dictates of § 1291. Appealability of an order refusing entry, therefore, lies only if the order comes within an appropriate exception to the final judgment rule.

Petitioners now contend that appealability of the District Court's order under § 1291 may be premised on the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).[4] This Court recently articulated a strict test for application of the doctrine when it held in *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at

---

[4] There is some confusion as to whether petitioners' "collateral order" theory of appealability was properly presented to the Court of Appeals. At one point in the appeal, petitioners explicitly denied that the collateral order doctrine was an issue in the case. In petitioners' Supplemental Memorandum to the Fourth Circuit Court of Appeals, filed February 9, 1979, they stated (at 2):

> Because this case does not invoke the "collateral order doctrine" of *Cohen* [v. *Beneficial Indus. Loan Corp.,* 337 U.S. 541 (1949)], *Seigal* [v. *Merrick,* 590 F.2d 35 (2d Cir. 1978)] is inapplicable.

Petitioners maintain in their brief to this Court (Pet. Br. at 20 n. 9), however, that they intended the Court of Appeals to consider this theory as an alternative to 28 U.S.C. § 1292(a)(1). The opinion of the Court of Appeals does not address the collateral order issue, and it is clear from the statement of the issue before the Court of Appeals that it was not considering § 1291 (606 F.2d at 421):

> Plaintiffs seek an interlocutory appeal under 28 U.S.C. § 1292(a)(1) of the district court's refusal to enter a consent decree agreed to by the named parties in a Title VII class action.

Should this Court decide that the collateral order doctrine was not properly submitted to the Court of Appeals, it should not now consider this issue. *Tacon* v. *Arizona,* 410 U.S. 351 (1973); *Adickes* v. *S. H. Kress & Co.,* 398 U.S. 144 (1970).

468, that a trial court's denial of class certification is not appealable as a collateral order:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. (Footnote and citations omitted.)[5]

Application of the *Coopers & Lybrand* test to this case demonstrates that no prong of the three-part conjunctive test can be met with respect to the order refusing to enter the proposed consent decree.

A. The Order Did Not Conclusively Determine The Disputed Question

The District Court's order does not satisfy this Court's requirement that the order "must conclusively determine the disputed question. . . ." *Id.* Petitioners claim that the "disputed question" is the "right to reach a lawful settlement of a Title VII employment discrimination case pursuant to the guidelines set forth by this Court in *Weber*. . ."[6] (Pet. Br. at 30).

Even assuming the existence of such a right, the plain fact is that there was nothing in the District Court's opinion which precluded the possibility of settlement. This was

---

[5] The articulation of this test has prompted the Second Circuit to observe that the *Coopers & Lybrand* decision evidences that "[t]he Supreme Court has recently given an even firmer direction. . ." to that Circuit's "disinclination to erode the finality doctrine by indirection." *Seigal* v. *Merrick*, 590 F.2d 35, 37 (2d Cir. 1978).

[6] "Weber" refers to *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979).

clearly recognized by the Court of Appeals when it observed (606 F.2d at 424):

> Under the *Flinn* [v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976)] analysis, the named parties may present a proposed decree to the district court in any form and at any stage in the proceedings. If one decree is refused another may be proposed. At any time the district court can reconsider its refusal to enter a decree. *See Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. at 547, 69 S.Ct. 1221.
>
> When a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record.

Accordingly, in contrast to an order of a trial court denying to a party the right to security for reasonable expenses that might otherwise be unrecoverable, *Cohen* v. *Beneficial Industrial Loan Corp., supra,* or one that purports to make final disposition of a claimed right to notice costs that might otherwise be irretrievable, *Eisen* v. *Carlisle & Jacquelin, supra,* the District Court's order in this case was inherently tentative and incomplete. A decision to allow immediate appellate review of such an inconclusive order (*Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 476):

> thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—"that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving." [Citing *Parkinson* v. *April Industries, Inc.*, 520 F.2d 650, 654 (2d Cir. 1975)]

This admonition is applicable here notwithstanding petitioners' weak claim that the "*tenor* of the district court's

opinion below *tended* to indicate that a final determination had been made." (Pet. Br. at 41; emphasis added.) Petitioners' speculation about the District Court having made a "final determination" of their alleged right to settle, a right premised on a case which had not been decided at the time of the District Court's decision and which is, in any event, of questionable applicability,[7] cannot serve as a workable test for appealability, nor does it present a compelling reason for thrusting an appellate court into the trial process. The courts of appeals should not have to examine whether a district court's refusal to enter a proposed consent decree conclusively determined the disputed question by having to assess something as nebulous as the "tenor" of its opinion.

The right to reach a settlement in this case having remained open to petitioners in many forms, including requesting reconsideration by the District Court of the tendered decree, there was no "conclusive determination of the disputed question." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468.

B. The Order Did Not Resolve An Important Issue Completely Separate From The Merits

Nor can this order satisfy the second prong of the collateral order test of "resolv[ing] an important issue completely separate from the merits of the action. . . ." *Coopers & Lybrand* v. *Livesay, id.* Here again, that "issue," as framed by petitioners, is their alleged right to settle "pursuant to the guidelines set forth by this Court in *Weber*" (Pet. Br. at 30). They claim that such a "right" is "separate and anterior to the merits of the claims in the Title VII action" (*id.*) and "not enmeshed in the issues of a Title VII suit" (*id.* at 32).

[7] See discussion *infra,* at 13-14.

It is first noted that the existence of the "right" to settle pursuant to the tendered decree, as now articulated by petitioners, is an issue encompassed within the "abuse of discretion" questions expressly excluded from the grant of certiorari in this case.[8] Such a "right" is not a part of the narrow procedural question as to which certiorari was granted, particularly when the issue was not briefed or argued in the courts below. As the majority in the Court of Appeals properly observed (606 F.2d at 424):

> Such argument is vital when appellate courts must authoritatively opine about important unsettled legal issues of the highest social concern in the amorphous context of reviewing a trial court's exercise of discretion.

This observation is even more pertinent in reviewing such an issue in the context of a narrow procedural question.

Further, there is no such thing as a *Weber* right to settle in a litigation context. *Weber* did not involve settlement by parties in litigation. The limited crafts training affirmative action plan agreed to in *Weber* by the employer and the

---

[8] The questions presented in the petition and excluded by this Court's order issuing the writ of certiorari were the following:

> 2. Whether the federal district court below erred in holding that the due process clause of the Fifth Amendment to the Constitution of the United States and Title VII of the Civil Rights Act of 1964, prohibit federal courts from judicially approving, in the absence of discrimination by defendants against plaintiffs and other class members, proposed consent decrees providing for remedial use of race-conscious affirmative action program in accordance with requirements set forth in *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, —— U.S. —— 61 L. Ed. 2d 480 (1979)?
>
> 3. Whether the district court below applied proper criteria, or otherwise abused its discretion, under Federal Rules of Civil Procedure 23(e) in refusing to approve a proposed settlement by the parties of a Title VII class action?

union in a collective bargaining setting did not involve judicial intervention in any form, either under Fed.R.Civ.P. 23(e) or through imposition of a remedy following trial. The constitutionality of such judicial intervention was not at issue. *Cf., Shelley* v. *Kraemer,* 344 U.S. 1 (1947).

In any event, whether *Weber* is or is not involved, a right to settle in a Title VII action is not *"completely* separate from the merits of the action" (emphasis added) as required by the *Coopers & Lybrand* test. Fed.R.Civ.P. 23(e) and the appellate abuse of discretion test for review of trial court approval or rejection of consent decrees require that a district court make a preliminary assessment of the merits of the positions of the parties in considering a proposed consent decree. *See, e.g., Seigal* v. *Merrick, supra,* 590 F.2d at 38; *Flinn* v. *FMC Corp.,* 528 F.2d 1169 (4th Cir. 1975), *cert. denied,* 424 U.S. 967 (1976).[9] Unlike the situation posed in *Mercantile National Bank* v. *Langdeau,* 371 U.S. 555 (1963), wherein the trial court's order determined the ancillary but vital issue of proper forum, or that presented by *Cohen* v. *Beneficial Industrial Loan Corp., supra,* wherein the trial court ruled on the collateral but critical question of whether a shareholder was required to post security for costs, the District Court's order in this case of necessity involved considerations that were "enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank* v. *Langdeau, supra,* 371 U.S. at 558.

Such involvement with the factual and legal issues com-

---

[9] *See also West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub. nom., Cotter Drugs, Inc.* v. *Chas. Pfizer & Co.,* 404 U.S. 871 (1971); *In re International House of Pancakes Franchise Litigation,* 487 F.2d 303, 304 (8th Cir. 1973); *United Founders Life Ins. Co.* v. *Consumers Nat'l Life Ins. Co.,* 447 F.2d 647, 655 (7th Cir. 1971).

prising petitioners' cause of action would in all likelihood have been even greater had the *Weber* issue been presented to the District Court. Petitioners' reliance on the language in *Weber* indicating that because the plan there was voluntary, the Court was "not concerned with what Title VII requires or with what a court might order to remedy a past proved violation of the Act," (Pet. Br. at 32), is inappropriate to a matter in litigation, especially where a court must meet its Rule 23(e) responsibilities.

The petitioners and all of the *Amici* also argue that the right to settle a Title VII action is such an "important issue" that to deny appealability of an order refusing entry of a consent decree in a Title VII action will undercut the policy of Title VII favoring voluntary conciliation and settlement. Although that argument has some surface appeal, it does not withstand examination.

Title VII does favor conciliation and the avoidance of litigation,[10] but as this Court has recognized, that policy,

---

[10] 42 U.S.C. § 2000e-5 (1976) contains the only language in Title VII with respect to conciliation, and that applies only to the Equal Employment Opportunity Commission. Section 2000e-5(b) provides:

* * *

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, *the Commission* shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. (Emphasis added.)

Section 2000e-5(f)(1) provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, *the Commission* has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, *the Commission* may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . .

to the extent it is expressed in the Act itself, is applicable only to the agency proceedings level (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)):

> Cooperation and voluntary compliance were selected as the preferred means for achieving this goal. To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion *before the aggrieved party was permitted to file a lawsuit.* (Emphasis added.)

Even the dicta from *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399 (5th Cir. 1969), cited by petitioners for the proposition that "efforts should be made to resolve these employment rights by conciliation both before and after court action" (Pet. Br. at 35), was premised on a specific provision of Title VII applicable only to the Equal Employment Opportunity Commission and not to Title VII litigation generally.[11]

Accordingly, to the extent there is a policy promoting settlement of Title VII cases once they are in litigation, it

---

(Cont. from preceding page)

* * *

> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of *the Commission* to obtain voluntary compliance. (Emphasis added.)

[11] *Dent* v. *St. Louis—San Francisco Ry., supra,* 406 F.2d at 402:

> Section 706(e) further provides:
>
> Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending. . . *the efforts of the Commission to obtain voluntary compliance.* (Emphasis added.)

is no different from the general judicial policy favoring settlement in any litigation. *See, e.g., Williams* v. *First National Bank,* 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts. . . ."); *Speed Shore Corp.* v. *Denda,* 605 F.2d 469, 473 (9th Cir. 1979) ("It is well recognized that settlement agreements are judicially favored as a matter of sound public policy"); *Autera* v. *Robinson,* 419 F.2d 1197, 1199 (D.C. Cir. 1969) ("Voluntary settlement of civil controversies is in high judicial favor"); *W. J. Perryman & Co.* v. *Penn Mutual Fire Insurance Co.,* 324 F.2d 791, 793 (5th Cir. 1963) ("The law favors and encourages compromises"). The importance of a right to settle in Title VII actions is thus the same as in any other litigation and there is no reason for carving out a special exception to the final-judgment rule for settlement agreements in Title VII cases, just as this Court has held that there is no reason for carving out a limited exception to the exclusive bargaining principle under the National Labor Relations Act to accommodate the public policy purposes of Title VII in the curing of discrimination. *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50 (1975).

This Court has also observed in an analogous context relative to special rules in class actions that (*Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 470):

> Those rules do not, however, contain any unique provisions governing appeals. The appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation.

This reasoning is every bit as applicable here, there being no unique provisions covering appeals in Title VII cases. Directly *apropos,* also, is this Court's observation (*id.*):

> Respondents, on the other hand, argue that the class action serves a vital public interest and, therefore, special rules of appellate review are necessary to ensure that district judges are subject to adequate supervision and control. Such policy arguments, though proper for legislative consideration, are irrelevant to the issue we must decide.

For all these reasons, the order in the case now before this Court cannot meet the second prong of the collateral order test of "resolv[ing] an important issue completely separate from the merits of the action. . . ." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468.

C. The Order Is Not Effectively Unreviewable

The third prong of the collateral order doctrine is that the order "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 468.

As the Court of Appeals indicated, after final judgment either party to the proposed consent decree may ask for review of the District Court's order denying entry of the decree, or, for that matter, of several alternative decrees. The parties could then argue (606 F.2d at 424):

> the importance of the law and facts as they appeared when the decree was proposed. Where alternative or revised decrees have been presented, the parties could advocate on appeal the alternative most favorable to their positions in light of the law and facts appearing when it was presented.

The availability of such final judgment review takes the denial of entry of a proposed decree out of the rubric of the third prong of the collateral order test.

Petitioners, in addressing this aspect of the collateral order rule, state that the test is that "the order must be one whose review cannot be postponed until final judgment because delayed review will cause irreparable harm by causing the rights conferred to be irretrievably lost" (Pet. Br. at 29). In their very short treatment of this third prong of the test (Pet. Br. at 43), however, they simply refer to "the reasons previously mentioned [in petitioners' brief] . . . with respect to why the district court's order in this case was a final determination of petitioners' collateral rights [and] . . . caused petitioners' irreparable injury." *Id.* Those reasons are three in number, and none of them constitute the claimed irreparable harm justifying immediate appellate review.

Petitioners' first reason is "[t]he right to reach a lawful settlement . . . pursuant to the guidelines set forth by this Court in *Weber* . . ." (Pet. Br. at 30). As is discussed, *supra,* at 13-14, there is no such right. Its possible existence is not a part of the narrow issue as to which certiorari was granted. Even if there were such a right, there was nothing in the District Court's order which precluded the right to settle, including reconsideration of the proposed consent decree, as facts were further developed or as changes in the law occurred after the order was entered.

The second reason advanced is the alleged *"tenor* of the district court's opinion below [which] *tended* to indicate that a final determination had been made" with respect to the so-called *Weber* right to settle (Pet. Br. at 41; emphasis added). This reason has been treated, *supra,* at 10-12. It is simply too speculative to support a claim of irreparable harm. Indeed, this reason does not comport with reality because the opinion of the District Court is dated June 1, 1977, more than two years before this Court announced

the *Weber* decision on June 27, 1979. Given this fact, it is hard to see how petitioners can seriously maintain that the district judge made a "final determination" as to their alleged *Weber* right to settle.

Assuming, *arguendo,* that the District Court's order was a final determination as claimed by petitioners, immediate remedies were available which negate any claim of irreparable harm in having to await post-judgment review. Where a district court clearly abuses its discretion in rejecting a proposed consent decree, a writ of mandamus under 28 U.S.C. § 1651 (1976) and Fed.R.App.P. 21(a) provides interlocutory review. *See Axim & Sons Lumber Co.* v. *Long Island Rail Road Co.,* No. 79-3082 slip op. (2d Cir., August 11, 1980); *Rodgers* v. *U. S. Steel Corp.,* 541 F.2d 365, 372 (3d Cir. 1976). Another means of obtaining prompt review exists under the Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b), which permits interlocutory review of a controlling and unsettled question of law where "an immediate appeal from the order may materially advance the ultimate termination of the litigation, . . ." 28 U.S.C. § 1292(b) (1976).[12] *See, e.g., Ruiz* v. *Estelle,* 609 F.2d 118, 119 (5th Cir. 1980).

---

[12] 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The final reason stated by petitioners in support of their claim of irreparable harm is that "there would be no way in which the parties, despite whatever might be done upon review of final judgment, could retrieve the advantages which a settlement would have brought" (Pet. Br. at 42). It is unclear what petitioners mean by "advantages," but whatever is intended, this reason does not rise to the level of irreparable harm as claimed by petitioners and, in fact, when analyzed, shows why there should be no exception to the finality rule for an order denying entry of a consent decree.

"Advantages" may mean the injunctive relief which was contemplated by the decree. If so, and the District Court did abuse its discretion in declining to enter the order, that advantage would be retrievable on post-judgment review.

On the other hand, if "advantages" means the loss of the opportunity to avoid the time and expense of further litigation, the facts of this case show that allowing immediate appeal from an order denying entry of a consent decree does not assure preservation of that advantage. Had the matter remained with the District Court, it could have been tried as early as June 1977. The parties' time and expense would be considerably less than has been incurred through the appellate procedure. This is also true had the matter been tried at the second trial date, February 4, 1980, following remand from the Court of Appeals. As it is, whatever decision is made on the procedural issue before this Court, resolution of the matter is still a long way off and at much greater expenditure of time and money than if the case had gone to trial or been resolved otherwise at a much earlier date.

These observations are particularly significant here where the theory now advocated by petitioners—a *Weber* right to settle—only arose during the course of the appellate

process. This highlights the danger that allowing immediate appeals from refusals to enter consent decrees will stimulate parties to take appeals in the hope that future developments in the law will help their cause. Such tactics will clog appellate calendars, delay resolution of cases, and force appellate courts to "authoritatively opine about important unsettled legal issues of the highest social concern" (*Carson* v. *American Brands, Inc., supra,* 606 F.2d at 424) without development of proper factual records and argument. These results would bring to realization the concern of this Court in *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 476, that allowing immediate appeal from non-final orders "thrusts appellate courts indiscriminately into the trial process" and "defeats one vital purpose of the final judgment rule," that is, preserving the dichotomy of trial and appellate functions established for the respective courts and critical to the smooth operation of any judicial system.

In sum, the order here is effectively reviewable on appeal. There is no irreparable harm in postponing appellate review until after final judgment. To the extent there is any doubt about the effectiveness of post-judgment review, it must be resolved against appealability in this case when examined in the light of the important competing interests of weighing "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950).

Accordingly, the District Court's order refusing entry of the proposed consent decree meets none of the prongs of the test for applicability of the collateral order doctrine. To allow an interlocutory appeal here would strip § 1291 of all significance. The Court of Appeals was correct in determining (606 F.2d at 424):

> We think this Title VII interlocutory appeal should be dismissed. Our review of this pretrial order has halted the litigation for over two years pending review of the district court's exercise of discretion. Given this disruption and the difficult burden on appeal of demonstrating an abuse of discretion, plaintiffs have identified no consequence requiring appellate review before final judgment. We perceive none. Instead, we think our review is best left to follow final judgment.

D. The Reasoning Of The Ninth Circuit In Norman v. McKee Is Not Persuasive

Petitioners and the *Amici* urge that the Ninth Circuit's opinion in *Norman* v. *McKee*, 431 F.2d 769 (1970), *cert. denied*, 401 U.S. 912 (1971), is in conflict with the decision of the Court of Appeals below and with *Seigal* v. *Merrick*, 590 F.2d 35 (2d Cir. 1978), and they argue that *Norman* states the better rule, *i.e.*, that orders refusing settlements of class action cases are appealable collateral orders.[13] *Norman* is not persuasive here for a number of reasons.

First of all, the *Norman* case was decided in 1970, some eight years before this Court's decision in *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. 463, and the Ninth Circuit did not have the benefit of this Court's further explanation of the collateral order doctrine as set forth in that case. The Second Circuit's decision in *Seigal* was thus better reasoned than *Norman* because it considered the *Coopers & Lybrand* decision.

Secondly, this Court's focus in *Coopers & Lybrand* was on the subjective economic factors which had evolved in

---

[13] As noted, *supra*, n.4, the Court of Appeals below did not pass upon the applicability of the collateral order doctrine to the District Court's June 1, 1977 order refusing entry of the tendered consent decree.

the courts below for determining under the "death knell" doctrine when a refusal to certify a class action was or was not appealable. The concern was that "[u]nder the 'death knell' doctrine, appealability turns on the court's perception of [the economic] impact in the individual case." *Coopers & Lybrand v. Livesay, supra,* 437 U.S. at 470-71. The Court observed (*id.* at 473):

> A threshold inquiry of this kind may, it is true, identify some orders that would truly end the litigation prior to final judgment; allowing an immediate appeal from those orders may enhance the quality of justice afforded a few litigants. But this incremental benefit is outweighed by the impact of such an individualized jurisdictional inquiry on the judicial system's overall capacity to administer justice.

Norman turned on just such an economic, "individualized jurisdictional inquiry." Having noted that "stockholder derivative suits and class actions generally present complex questions and involve large numbers of exhibits and witnesses," the *Norman* court then concluded (431 F.2d at 779):

> The present case is a good example. The trial would be lengthy and expensive. In this situation, therefore, we think that the cost and delay of the piecemeal review, as balancing factors, are diminished in importance. . . .

Based on such economic factors, the *Norman* court ruled in favor of immediate appeal from an order denying entry of a consent decree. Had the matter in *Norman* not involved a "lengthy and expensive" trial, the result could well have been different. Such an individualized, economic approach

to appealability runs contrary to the *Coopers & Lybrand* analysis.[14]

The decision in *Norman* has also been properly criticized for its failure to recognize that judicial review of a proposed settlement is not devoid of some examination of the underlying cause of action, *In re General Motors Corp. Engine Interchange Litigation,* 594 F.2d 1106, 1119 (7th Cir. 1979).[15] As the Court of Appeals below stated, quoting *Seigal* v. *Merrick, supra,* 590 F.2d at 37 (*Carson* v. *American Brands, Inc.,* 606 F.2d at 423):

> [A]n order disapproving a settlement . . . is based, in part, upon an assessment of the merit of the positions of the respective parties, and permits the parties to proceed with the litigation or to propose a different settlement.

---

[14] The Court of Appeals for the Second Circuit focused on this length of trial-cost factor analysis in explaining, in part, why they "must differ with our friends on the Ninth Circuit," by observing (*Seigal* v. *Merrick,* 590 F.2d at 39):

> In *Norman* v. *McKee,* the court emphasized that a trial would be expensive and lengthy and that, hence, the cost and delay of piece-meal review, as balancing factors, were diminished in importance.

[15] This decision allowed an appeal from a district court order *approving* a settlement and turned on facts peculiar to that case. Further, the Seventh Circuit correctly recognized the distinction between an approval of a settlement and a disapproval for purposes of appealability under the collateral order doctrine (*id.* at 1119, n. 15):

> In the case at bar, the trial court's approval of the subclass settlement does not lead directly to final judgment. *But unlike a disapproval of a settlement, the trial court's order looks toward neither a renewal of settlement negotiations nor a trial on the merits.* Thus, the danger of appellate court interference with proceedings before the trial court is small in comparison with the danger of denying justice by delay. (Emphasis added.)

For these reasons, the Ninth Circuit's decision in *Norman* is unpersuasive here.

II.

The District Court's Order Refusing Entry Of The Consent Decree Is Not Appealable Under The Congressionally Created Exception To The Finality Rule, 28 U.S.C. § 1292 (a)(1)

A. As A Narrow Exception To The Final Judgment Rule, Section 1292(a)(1) Should Be Strictly Construed

When the pressure for appealability of certain interlocutory orders "rises to a point that influences Congress, legislative remedies are enacted." *Baltimore Contractors, Inc.* v. *Bodinger,* 348 U.S. 176, 181 (1955). These legislative remedies, such as the device of certification under § 1292 (b), explored, *supra,* at 20, create exceptions to the "long-established policy against piecemeal appeals, which this Court is not authorized to enlarge or extend." *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478, 480 (1978).

The Court of Appeals dismissed this appeal on the ground that the District Court's order was not appealable under one of these legislative remedies, 28 U.S.C. § 1292 (a)(1), which allows appeal from "[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . ."

Petitioners and *Amici* contend, however, that the order rejecting the consent decree is appealable under this statutory exception because some terms of the decree involved injunctive-type relief, bringing the order within the literal "refusing . . . injunctions" language of § 1292(a)(1). Even if this were so, however, a literal interpretation of an order as one "refusing" an "injunction" simply because it involves

injunctive relief only begins the inquiry into appealability under § 1292(a)(1). As the Court of Appeals below properly observed, "[a] mere labelling of relief is not sufficient." 606 F.2d at 422 (citing *City of Morgantown, W. Va.* v. *Royal Insurance Co.*, 337 U.S. 254, 258 (1949)).

Rather than apply a literal approach to § 1292(a)(1) that could make immediately appealable any pre-trial order involving claims for injunctive relief, this Court has cautioned that the statute should be approached "somewhat gingerly lest a floodgate be opened that brings into the exception many pre-trial orders." *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966). Thus, its scope is "a narrow one . . . keyed to the 'need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence'." *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 480, quoting from *Baltimore Contractors, Inc.* v. *Bodinger, supra,* 348 U.S. at 181.

The decision of the Court of Appeals below was the first which analyzed the issue of appealability of an order denying a consent decree under § 1292(a)(1), and in holding such an order to be outside the statute, the Court of Appeals was cognizant of this Court's cautious approach to expanding appealability. While this matter was pending on petition for writ of certiorari, however, the Court of Appeals for the Fifth Circuit seems to have reached a contrary result. *United States* v. *City of Alexandria,* 614 F.2d 1358, 1361 n.5 (5th Cir. 1980). Analysis demonstrates that no "serious, perhaps irreparable, consequence[s]" flow from postponing review of the District Court's order in this case and that the better view was that followed by the Court of Appeals below, not that of the Fifth Circuit.[16]

[16] The Fifth Circuit's opinion in *City of Alexandria* is treated, *infra,* at 36-39.

B. The Rejection Of The Tendered Decree Did Not Cause Irreparable Consequences Which Can Be Alleviated Only Through Allowance Of Interlocutory Appeal

In *Gardner* v. *Westinghouse Broadcasting Co., supra,* this Court held that an order denying class certification under Rule 23 was not appealable under § 1292(a)(1), even though the practical effect of the order was to tentatively refuse a portion of the injunctive relief sought in the complaint. The order in *Gardner* did not have the direct or irreparable effect necessary for § 1292(a)(1) appealability because (437 U.S. at 480-81):

> [i]t could be reviewed both prior to and after final judgment; it did not affect the merits of petitioner's own claim; and it did not pass on the legal sufficiency of any claims for injunctive relief. (Footnote omitted.)

The District Court's order refusing entry of the proposed consent decree was precisely of the same effect as the order denying class certification in *Gardner,* and is therefore also not appealable under § 1292(a)(1).

1. The Order Could Be Reviewed Both Prior To And After Final Judgment

The District Court's rejection of the tendered consent decree did not affect petitioners' ability to obtain injunctive relief at a later stage in the proceedings. As the Court of Appeals for the District of Columbia has stated, in a case cited with approval by this Court in *Sampson* v. *Murray,* 416 U.S. 61, 90 (1974), "[t]he possibility that adequate . . . corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F.2d 921, 925 (D.C. Cir. 1958). In this case, petitioners remained fully able to obtain in-

junctive relief at any of three later stages—prior to trial, at trial or through a post-judgment appeal.

The most immediate means of obtaining injunctive relief short of trial would have been an alternative consent decree. The District Court's order simply rejected the particular consent decree which was tendered. The parties could have tendered another consent decree, either admitting different facts or awarding different relief, which may well have been approved by the District Court. As the Court of Appeals for the Second Circuit has noted, "the denial of one compromise does not necessarily mean that a 'sweetened' compromise may not be approved." *Seigal* v. *Merrick, supra,* 590 F.2d at 39.

The contention that the "tenor" of the District Court's opinion (Pet. Br. at 41) "effectively denie[d] petitioners and respondents alike the opportunity to settle their dispute voluntarily" (Br. of U.S. at 10) is unavailing. As the Court of Appeals observed, the parties could have presented the same or alternative proposals at any stage in the proceedings (606 F.2d at 424):

> When a district court objects to the terms of a decree, alternative provisions can be presented, and perhaps a disapproved decree may be entered with further development of the record. If the district court refuses a decree because it is presented too early in the litigation, it may be later approved, perhaps following a decisive vote by class members. Whatever the district court's reasons for refusing a decree, appeals of right from those refusals would encourage an endless string of appeals and destroy the district court's supervision of the action as contemplated by Fed.R.Civ.Proc. 23(e).

Thus, petitioners' assumption that all possibility of settlement was foreclosed is mere speculation. Even assuming,

however, that the parties were unable to negotiate an alternative settlement, there remained other means of obtaining injunctive relief short of trial and post-judgment review. If the trial court clearly abused its discretion, a writ of mandamus would provide immediate review. *Rodgers* v. *U.S. Steel Corp.*, 541 F.2d 365, 372 (3d Cir. 1976). If one or more of the parties believed that the District Court's determination involved controlling and unsettled questions of law, resolution of which might materially advance the litigation, a request for certification under 28 U.S.C. § 1292(b) could have been made. *Ruiz* v. *Estelle,* 609 F.2d 118, 119 (5th Cir. 1980). Petitioners attempted neither mandamus nor § 1292(b) certification. However, accepting as true the alleged errors of the District Court set forth by petitioners, either mandamus or § 1292(b) could have provided effective avenues of relief.

Further, although petitioners contend that the District Court's rejection of the decree "precluded a subsequent motion" by them for "a preliminary injunction granting all, or part, of the relief specified in the proposed consent decree," (Pet. Br. at 64), nothing in the District Court's opinion precluded any such application. Had petitioners made application for preliminary injunctive relief, the District Court would necessarily have undertaken *de novo* consideration of the grounds alleged in support. The stipulations that had been of special concern to the District Court when it reviewed the proposed decree[17] would have merited no consideration in the Court's assessment of "the existence of a substantial likelihood that [petitioners] will ultimately

[17] For example, the District Court noted in rejecting the decree that it was particularly concerned with respondents' express denial of unlawful conduct and petitioners' failure to deny respondents' assertion (*see* 446 F.Supp. at 788-89) and with the decree's additional stipulation that "the Court finds . . . that there are no discriminatory hiring practices at [Leaf]" (*id.* at 783).

prevail on the merits" (Pet. Br. at 64-65). Since nothing foreclosed petitioners from applying for injunctive relief and establishing any facts necessary for such relief, the District Court's order did not once and for all deny petitioners "the protection of the injunction prayed . . ." *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430, 433 (1932). Rather, "[h]ere, injunctive relief was not finally denied; it was merely not granted at this stage in the proceedings." *Carson* v. *American Brands, Inc., supra.* 606 F.2d at 423.

The combination of District Court reconsideration of the proposed order, consideration of an application for a preliminary injunction or of another settlement proposal, the opportunities noted above for expedited interlocutory review, and effective appellate review after final judgment renders unsupportable any claim herein of "irreparable injury." It is not necessary to open the floodgates by judicial expansion of § 1292(a)(1). Like the denial of class certification in *Gardner,* the District Court's initial rejection of a consent decree produces no " 'irreparable' effect" because its order "could be reviewed both prior to and after final judgment." *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 478.

2. The Order Did Not Affect Or Pass On The Legal Sufficiency Of Any Claims For Injunctive Relief

Nor can it be established that the District Court's order caused a direct or irreparable effect by "affect[ing] the merits" of petitioners' claims for injunctive relief and "pass-[ing] on the legal sufficiency" of any such claims. *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 481. In an effort to show the necessary "serious, perhaps irreparable" effect, petitioners, as they submit under their collateral order argument, again maintain that the District

Court's order "concerns [their] right under Title VII as well as the parties' right to institute an affirmative action plan" in conformance with the *Weber* decision (Pet. Br. at 66-67 n.21), and that "the order of the district court was based entirely upon its misapprehension of applicable legal principles." (*Id.* at 71).[18]

---

[18] Petitioners' argument of irreparable injury by denial of a "*Weber*-type" right in support of their claim of appealability under § 1292(a)(1) seriously undermines their alternative position that the District Court's order was a "collateral order" under *Cohen* v. *Beneficial Indus. Loan Corp., supra,* and its progeny. Petitioners must meet the almost impossible task of establishing that one court order "pass[ed] on the legal sufficiency of [their] claims" (*Gardner, supra*) (§ 1292(a)(1)) and was at the same time "separate and independent" of their claims (collateral order) (§ 1291). They attempt to reconcile these "apparently inconsistent positions" by stating that the two appealability positions "involve different rights," (Pet. Br. at 66-67 n.21):

> With respect to the appealability of the order below as a collateral order, the right affected is the parties' right to *settle* the case, prior to trial, in accordance with standards set forth in *Weber, supra.* This right is, of course, separate and independent of the right sued upon pursuant to Title VII.
>
> On the other hand, the right affected with respect to the refusal of an injunction concerns petitioner's [*sic*] right under Title VII as well as the parties' right to institute an affirmative action plan. The former, of course, is exactly the right sued upon and therefore an order adversely affecting it touches on the merits of the action. (Emphasis in original.)

This attempt at reconciliation fails. Since the proposed consent decree was rejected in part because of the District Court's preliminary determination that the petitioners' claims would not support the proposed relief under Title VII, it is obvious that the decision was inextricably linked to the merits of the main claims. Hence the order rejecting the consent decree cannot, in this case, be "separate and independent" of the Title VII claim for purposes of establishing appealability under the collateral order doctrine.

It stands to reason that a single court order cannot simultaneously be "collateral to" the claim, as required by the collateral order doctrine, while at the same time "affect[ing] the merits" of petitioners' claims and "pass[ing] on the legal sufficiency of any claims for injunctive relief," as required for appealability under § 1292(a)(1).

These claims cannot withstand scrutiny for several reasons. First, as noted in the collateral order section, *supra*, at 10-15, whether a right exists under *Weber* to "institute an affirmative action plan" by way of settlement of a Title VII action is an issue simply not briefed, argued or addressed by the courts below, nor yet addressed by this Court, and indeed is encompassed within the "abuse of discretion" questions specifically denied review in this case.

Second, whatever such *Weber* "settlement rights" may ultimately be discerned, they most certainly did not exist in June 1977 when the District Court made its determination. Had petitioners desired reconsideration of this order in light of *Weber*, they were free to so move when the case returned to the District Court. Yet they made no attempt to obtain reconsideration despite the plain invitation of the Court of Appeals to do so.

Third, assuming that such a "right to settle" a Title VII case pursuant to *Weber* came into existence after the District Court's decision, petitioners would have this Court enlarge the narrow final judgment statutory exception to encompass immediate appeal and review in circumstances where no clear mistake of law was made by the District Court but subsequent changes in the law become the issue on appeal. Such an expansion could open the floodgates to appeal based on predicted or anticipated rights and render nugatory the strict showing of "serious, perhaps irreparable" injury required by § 1292(a)(1).

Accordingly, the applicability of *Weber* to petitioners'

(Cont. from preceding page)

Gardner, supra, 437 U.S. at 480-81 (footnote omitted). Such schizophrenic characterization of a single court order further illuminates the wisdom of this Court's policy of narrowly interpreting the general rule of finality and letting "[t]he choices fall in the legislative domain." *Baltimore Contractors* v. *Bodinger, supra*, 348 U.S. at 181-82.

claim of irreparable injury for purposes of establishing appealability is dubious. Petitioners, however, further contend that denial of interlocutory appeal poses "the danger of serious harm" (Pet. Br. at 72) since the District Court's order "as a practical matter, denied injunctive relief to petitioners on the ground that their claim was legally insufficient," (*id.* at 73), and "settle[d], or tentatively decide[d], the merits of petitioners' claims on the merits" (*id.* at 66). This contention confuses the scope of review required of the District Court in considering a settlement proposal and ignores the tentativeness of any conclusions drawn in such a review as compared with the more exacting standards appropriate to a judgment on the merits.

Although an order rejecting a consent decree may "touch on" the merits of petitioners' claims to the extent that the court must consider the merits of the claims while reviewing a settlement proposal, *see, e.g., Flinn* v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976), such a non-determinative, tentative review of the merits, like the review of the merits which a district court must make in deciding a motion for class certification, "does not otherwise reflect on the legal sufficiency of the claim for injunctive relief." *Gardner* v. *Westinghouse Broadcasting Co., supra*, 437 U.S. at 482 n.9. The District Court's order did not impair petitioners' ability to prove facts at trial which may have entitled them to injunctive relief. The contrary conclusion by petitioners and *Amici* (*e.g.*, Pet. Br. at 65) ignores the distinction between findings of fact on the merits and the District Court's review of factual submissions in passing on the sufficiency of a proposed consent decree. In short, while the District Court may have expressed an opinion concerning the lawfulness of the tendered decree, it did not pass on the legal sufficiency of petitioners' claims for

injunctive relief in any other form and under any other factual circumstances. Denial of entry of the particular decree presented here thus caused no "serious, perhaps irreparable" harm.

While the failure of one negotiated settlement, with its attendant benefits such as avoidance of the expense and risk of litigation and conservation of judicial resources (*e.g.*, Br. of U.S. at 10-11), may well be "serious," such a failure would in no way impair the ability of the petitioners to proceed to trial and obtain all available and warranted relief. The District Court's order may have shelved the first settlement proposed and in that sense appeared "serious" and important at the time, yet "[m]any interlocutory orders are equally important,... but they are not for that reason converted into injunctions." *City of Morgantown, W.Va.* v. *Royal Insurance Co.*, 337 U.S. 254, 258 (1949).

By its nature inherently tentative and in no way dispositive of the legal sufficiency of petitioners' claims to injunctive relief, the District Court's order in this case had the same effect as the order found to be outside the scope of § 1292(a)(1) in *Switzerland Cheese Association* v. *E. Hornes Market, Inc.*, 385 U.S. 23 (1966). There, the District Court denied a motion for summary judgment that included prayers for permanent injunctive relief. This Court denied appealability as of right under § 1292(a)(1) "for the reason that the denial of a motion for a summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim." *Id.* at 25. The same result is true in this case. The District Court's order "decide[d] only one thing—that the case should go to trial." *Switzerland Cheese Association* v. *E. Horne's Market, Inc., supra,* 385 U.S. at 25. It did not dispose of any prayers for injunctive relief once and

for all, and thus stands in stark contrast to the order dismissing a counterclaim that included demands for injunctive relief which was found appealable in *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430 (1932).

3. The Fifth Circuit's City Of Alexandria Case Was Wrongly Decided

As noted, *supra*, the Court of Appeals for the Fifth Circuit has rendered a decision seemingly contrary to that of the Court of Appeals below. *United States* v. *City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980). However, what little rationale is provided in *City of Alexandria* is superficial and based in large part upon cited precedent in that Circuit which is of doubtful authority.

The Fifth Circuit explains its position that an order refusing a consent decree containing injunctive relief is appealable under 1292(a)(1) in only a two-paragraph footnote. It determines that, since earlier Fifth Circuit cases had (*id.* at 1361 n.5):

> held that an order *approving* a settlement containing injunctive provisions relating to recruitment and hiring was one " 'granting,' 'continuing,' or 'refusing to dissolve' an injunction," and was therefore appealable. . . . an order *refusing* approval of a consent decree is *necessarily* one "refusing" an injunction for purposes of § 1292(a), and is therefore appealable. (Emphasis added.)

This rationale is mistaken in two respects.

First, the cited precedent relied upon by the Fifth Circuit in *City of Alexandria* for its initial proposition that orders "approving" settlements containing injunctive provisions are always appealable under § 1292(a)(1) as orders

"granting" injunctions does not in fact support that proposition because appeal in none of those cases was expressly premised on § 1292(a)(1). The most recent of the three Fifth Circuit cases relied upon is *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir.), *cert. denied sub. nom., Local 741 International Brotherhood of Electrical Workers* v. *Myers,* 434 U.S. 801 (1977). There, the consent decree which was under review determined not only the issue of liability, but also back pay. *Id.* at 845. Further, the district court "gave final approval to the consent decree between the plaintiffs and the company . . ." after there had been a trial on the merits as to the union's liability. *Id.* at 846. Under these facts, the order could very well have been considered "final" under § 1291. All that was said in *Myers* on the appealability issue consisted of the following (*id.* at 847):

> Appellants argue that since the court order finally approved the settlement and thus effected certain changes in the collective bargaining agreements retroactive to January 1 1975, the order was one "granting," "continuing," or "refusing to dissolve" an injunction under section 1292(a). Injunctive provisions of a consent decree have recently been held adjudicative and appealable by this court, and consequently this court has jurisdiction in the instant appeal. *See Sagers* v. *Yellow Freight System, Inc.,* 529 F.2d 721, 730 (5th Cir. 1976); *United States* v. *T.I.M.E.-D.C., Inc.,* 517 F.2d 299, 307 n.11 (5th Cir. 1975), *cert. granted,* 425 U.S. 990, 96 S.Ct. 2200, 48 L.Ed.2d 814 (1976).

This reasoning is devoid of any distinctions between §§ 1291 and 1292(a)(1). It is also devoid of any distinction under § 1292(a)(1) between an approval and a refusal of a consent decree. The opinion does not address the complicated problems involved and cannot be viewed as any

authority on the appealability of an order refusing entry of a consent decree. Moreover, the two Fifth Circuit cases cited as authority in *Myers, i.e., Sagers* v. *Yellow Freight Systems, Inc.*, 529 F.2d 721 (5th Cir. 1976), and *United States* v. *T.I.M.E.-D.C.*, 517 F.2d 299 (5th Cir. 1975), *vacated and remanded on other grounds sub nom., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), both involved approvals, not refusals, of consent decrees and contained no discussion whatsoever of either § 1291 or § 1292(a)(1). Thus, the Fifth Circuit's casual reliance on these cases for the initial proposition that every order granting an injunction is immediately appealable under § 1292(a)(1) is suspect.

Second, even if the decisions cited by the Fifth Circuit *had expressly* held that *approval* of a consent decree containing injunctive provisions is always proper for immediate appellate review under § 1292(a)(1), they would still lend no support to the Fifth Circuit's unreasoned leap to the *converse* proposition, *i.e.*, that denial of such a decree is therefore "necessarily one 'refusing' an injunction" and thus appealable under § 1292(a)(1). Such literalism has never been the approved canon of construction for § 1292(a)(1). As another appellate court has properly recognized, "[t]he literal characterization of an order as an injunction only begins the inquiry into appealability." *Stateside Machinery Co.* v. *Alperin*, 526 F.2d 480, 482 (3d Cir. 1975). Were literalism the proper approach, a different result would have been mandated in *Gardner* v. *Westinghouse Broadcasting Co., supra*, since the denial of class certification necessarily and tentatively foreclosed certain prayers for injunctive relief. What the Fifth Circuit failed to appreciate is that entry of consent decrees properly falls within the category of motions which "generate an appealable order if granted, but

not if denied." 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *Federal Practice and Procedure,* § 3924, at 74 (1977).

By failing to consider the policies underlying § 1292(a)(1) and the effects which expanding appeals under the section may have on the judicial system, the Fifth Circuit mistakenly ignored this Court's construction of the § 1292(a)(1) exception as "a narrow one" aimed primarily at "interlocutory orders of 'serious, perhaps irreparable' consequence." *Gardner* v. *Westinghouse Broadcasting Co., supra,* 437 U.S. at 480. The better reasoned opinion is that of the Court of Appeals below, and it should be affirmed.

C. THE BURDEN ON THE JUDICIAL SYSTEM FROM ALLOWING INTERLOCUTORY APPEALS FROM ORDERS REJECTING CONSENT DECREES OUTWEIGHS ANY CONSEQUENCES OF POSTPONING JUDICIAL REVIEW

The Court of Appeals stated that decisions regarding the availability of § 1292(a)(1) interlocutory appeal should turn on a balancing of "the consequence of postponing appellate review" against "the important judicial interests militating against piecemeal review." 606 F.2d at 422, citing *Gardner,* and *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 473 (1978). As demonstrated above, the consequences of postponing appeal of an order rejecting a consent decree are minimal and remediable, both prior to and after final judgment.

By contrast, allowing interlocutory appeals as of right from such orders would substantially impair the interests which the final judgment rule was designed to protect. For one thing, availability of interlocutory review will lessen the incentive of the parties to work with the trial court and quickly resolve the litigation. Parties who spurn the invitation of the trial court to submit alternative pro-

posals will be rewarded with appellate review before they have begun to exhaust the spectrum of remedies available at the district court level. Indeed, parties entering into settlement negotiations in any action could ensure immediate appealability of orders denying their particular agreements simply by incorporating one or more terms calling for some injunctive relief, however inconsequential to the overall settlement scheme such relief might be. Moreover, the result urged by petitioners would create the potential for multiple appeals in every complex case, a result "quite unpredictable in its scope and incidence." *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 280 F.2d 800, 806 (2d Cir. 1960) (Clark, J., dissenting).

No summation of the interests and policies militating against immediate review in this case can be clearer or more apt than that of the Court of Appeals (606 F.2d at 425):

> In conclusion, the district court's discretionary decision to send the parties to trial, in lieu of granting immediate injunctive relief before the facts are settled, is not a ruling of irreparable consequence. Plaintiffs may proceed to trial with no loss of either their claims for final injunctive relief or their right of appellate review of the *Flinn* issue. Short of going to trial, the parties may propose alternative decrees to the district court, one of which may be entered. Appellate review of the order is best effected following final judgment. Such review preserves the trial court's exclusive control over the progress of the litigation and facilitates its supervision of the class action.

It has been the long-standing policy of this Court to defer to Congress when novel yet costly expansions of § 1292(a)(1) are offered, and this case presents no compelling circumstances warranting a departure from this policy. As the

Court stated in *Baltimore Contractors, Inc.* v. *Bodinger, supra* (348 U.S. at 181-82):

> The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants. . . . This Court . . . is not authorized to approve or declare judicial modification. . . . Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals with a consequent waste of time and money.

CONCLUSION

For the reasons presented, the decision of the Court of Appeals for the Fourth Circuit should be affirmed and the appeal dismissed.

Respectfully submitted,

HENRY T. WICKHAM
D. EUGENE WEBB, JR.
ROBERT D. SEABOLT
MAYS, VALENTINE, DAVENPORT
& MOORE
23rd Floor, F&M Center
P. O. Box 1122
Richmond, Virginia 23208
804-644-6011

PAUL G. PENNOYER, JR.
BERNARD W. MCCARTHY
PETER N. HILLMAN
CHADBOURNE, PARKE, WHITESIDE
& WOLFF
30 Rockefeller Plaza
New York, New York 10112
212-541-5800
Counsel for American Brands, Inc.

October 1980

NO. 79-1236

Supreme Court, U. S.
FILED
OCT 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

V.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY, LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

BRIEF FOR RESPONDENT UNIONS

Jay J. Levit
Imperial Building
Third Floor
422 East Franklin Street
Richmond, Virginia 23219

James F. Carroll
Air Rights Building
7315 Wisconsin Avenue, N.W.
Washington, D. C. 20014

Counsel for Respondent Unions

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA. (804) 643-7789

No. 79-1236

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT UNIONS

QUESTIONS PRESENTED

1. Whether there is a "case or controversy" within the meaning of Article III of the United States Constitution.

2. Whether the District Court's Order refusing to enter a proposed consent decree is appealable under 28 U.S.C. §§ 1291 or 1292(a)(1).

TABLE OF CONTENTS

	PAGE
Statement of the Case.....	2
Argument.....	7
I. Since The Proposed Consent Decree May Not Now Be Entered By The District Court, The Issue Presented By This Appeal Is Moot	8
II. The District Court's Order Refusing Entry Of A Proposed Consent Decree Is Not Appealable Under The Judicially Created "Collateral Order" Exception to 28 U.S.C. § 1291	19
III. The District Court's Order Refusing Entry Of The Consent Decree Is Not Appealable Under The Congressionally Created Exception To The Finality Rule, 28 U.S.C. § 1292(a)(1)	22
Conclusion.....	25

TABLE OF AUTHORITIES

CASES: PAGE

California Brewers Ass'n v. Bryant, ____ U.S. ____, 63 L.Ed. 2d 55 (1980)..... 14

Carson v. American Brands, Inc., 606 F.2d 420, 425 6

Ex Parte Baez, 177 U.S. 378, 390 (1900)..... 9

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).....13,14

Seigal v. Merrick, 590 F.2d 35 (2nd Cir. 1978)..... 5

United States v. Armour & Co., 402 U.S. 673 (1971)..... 14

United Steelworkers of American, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979).....20,21

West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966), cert. denied, 385 U.S. 1010 (1967)..... 13

STATUTES AND RULES:

Civil Rights Act of 1964, Title VII.....2,20,21
42 U.S.C. § 2000(e) et seq..... 2
42 U.S.C. § 1981..... 2

28 U.S.C. § 1292(a)(1).....15,22,23,24

28 U.S.C. § 1291..... 19

STATUTES-Continued:

	PAGE
Fed. R. Civ. P. 23(e).....	16
Fed. R. App. P. 41.....	6
Rule 11(F), Local Rules of Practice.	8

MISCELLANEOUS:

Williston on Contracts, 3rd Ed. § 1935.....	13

No. 79-1236

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION, and TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

BRIEF FOR RESPONDENT UNIONS

STATEMENT OF THE CASE

Petitioners, Frank L. Carson, Lawrence Hatcher and Stuart E. Mines ("plaintiffs") filed this action against respondents American Brands, Inc., t/a The American Tobacco Company ("American"), Local 182, Tobacco Workers International Union ("Local 182"), and Tobacco Workers International Union ("TWIU") (collectively "defendants") on October 24, 1975, in the United States District Court for the Eastern District of Virginia, Richmond Division. Plaintiffs alleged that the suit was brought on behalf of themselves and a class consisting of "all black persons who have sought employment and who are employed or might in the future be employed by the Company's [American's] Richmond Leaf Department . . . ." They alleged violations by defendants of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. and of 42 U.S.C. § 1981 (J.A. 1a-12a). In their respective answers, defendants denied any

violation of the cited statutes and asked that the complaint be dismissed (J.A. 13a-23a).

Pre-trial discovery was pursued by all parties beginning in January, 1976. On January 27, 1976, at a pre-trial conference, an Order was entered by the District Court setting the case for trial to begin on May 2, 1977. Just prior to the final pre-trial conference established by this Order, counsel for plaintiffs, by letter dated March 25, 1977, informed the Court that the parties had settled the liability phase of the litigation and that they wished to discuss the entry of a proposed consent decree at the final pre-trial conference on April 1.

At the April 1 conference, the Court expressed concern that the parties were no longer in an adversary posture and that certain provisions of the consent decree might violate the United States Constitution. The parties were requested to submit memoranda in support of the entry of the proposed consent decree.

After the requested memoranda were submitted, the Court refused to enter the tendered decree by order dated June 1, 1977. On June 24, 1977, plaintiffs filed a notice of appeal from this order (J.A. 57a-58a).

On October 12, 1977, the Court of Appeals for the Fourth Circuit entered an order establishing a briefing schedule. On January 10, 1978, before briefs were due from appellees, defendants informed the Clerk of the Court of Appeals that they had no position on the merits of the appeal, that the appeal was not an adversary proceeding as required by Article III of the United States Constitution and that they, therefore, would not submit briefs unless the Court otherwise ordered (J.A. 59a-60a).

Subsequently, the plaintiffs filed a motion for summary reversal to which the defendants were ordered to respond. Plaintiffs' motion was denied by order entered on January 31, 1978, an order which was later rescinded. Then on March 27, 1978,

the motion for summary reversal was again denied and the clerk was directed to invite the defendants to file a brief addressing the merits of the appeal (J.A. 62a-64a).

After all briefs were submitted, oral argument was heard before a panel of the Court of Appeals on October 3, 1978. While the matter was under advisement, the parties were informed by letter from the clerk dated January 25, 1979, of the panel's concern as to whether it had jurisdiction to entertain the appeal in light of Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978). Counsel were requested to file supplemental memoranda by February 9 (J.A. 65a-66a). After the requested memoranda were submitted, the Court of Appeals, sua sponte, agreed to an en banc hearing of the case without oral argument on June 5, 1979.

On September 14, 1979, the Court of Appeals dismissed the appeal holding that the District Court's refusal to enter the pro-

posed consent decree was not appealable. Carson v. American Brands, Inc., 606 F.2d 420, 425. The mandate of the Court of Appeals issued on October 5, in accordance with Fed. R. App. P. 41.

After informing plaintiffs' counsel by letter that defendants no longer consented to the entry of the proposed decree, the defendants, by motion filed in the District Court on October 10, 1979, requested the Court to hold a pre-trial conference for the purpose of establishing a trial date. In the motion, the defendants stated that they no longer consented to the entry of the proposed decree which had been presented to the Court by the parties on April 1, 1977 (J.A. 67a-68a). On November 2, the parties were notified that this case was again placed on the docket for trial, and that the Court would hold a pre-trial conference on November 15 (J.A. 69a-70a). At this pre-trial conference, the case was set for trial to begin on

February 4, 1980.

Two weeks after this case was set for trial, defendants were served with plaintiffs' application for an extension of time in which to file a petition for writ of certiorari. Thereafter, on December 5, 1979, plaintiffs moved the District Court for a stay of all further proceedings pending disposition of their petition. The requested stay was granted by order dated December 17, 1979.

The petition for a writ of certiorari was granted on June 16, 1980, limited to the question of whether an order refusing to enter a proposed consent decree is an appealable interlocutory order.

ARGUMENT

I. Since The Proposed Consent Decree May Not Now Be Entered By The District Court, The Issue Presented By This Appeal Is Moot.

After having informed counsel for plaintiffs that the defendants no longer

consented to the entry of the proposed decree which had been presented on April 1, 1977, the defendants filed a motion in the District Court on October 10, 1979, requesting a pre-trial conference for the purpose of establishing a trial date. Defendants stated in that motion that they no longer consented to the proposed decree. Plaintiffs filed no memorandum in response to this motion in accordance with Rule 11(F), Local Rules of Practice, nor did they lodge an objection with either the Court or counsel to such withdrawal of consent.

Subsequently, the District Court held a pre-trial conference at which time the case was set for trial to begin on February 4, 1980. Plaintiffs made no objection to this. And, by setting a trial date, the District Court apparently accepted the defendants' withdrawal of consent.

In view of defendants' withdrawal of consent which took place after the decision

of the Court of Appeals, this case is now moot. Since the proposed decree may not be entered by the District Court absent the consent of the defendants, the question of the appealability of the order refusing to enter it in April 1977 is purely academic. This appeal is moot because "there is no subject matter on which the judgment of the Court can operate." Ex Parte Baez, 177 U.S. 378, 390 (1900).

To date, the only suggestion that the defendants may not withdraw their consent to entry of the proposed decree has been made by the United States and the Equal Employment Opportunity Commission in their joint brief (Br. of U.S. at 18, fn. 14). Without citation of authority, Amici contend that, under its terms, none of the parties had the right to repudiate the proposed decree before the District Court had an opportunity to act, though they concede that the parties remain free to argue that the decree should not be

entered "because of unforseeable changed circumstances." Id.

The answer to this argument is that the District Court, under the theory of the Amici, had an opportunity to enter the proposed decree at the time the case was remanded on October 5, 1979. Moreover, both the Court and the plaintiffs did not accept the plain invitation of the dissenting judges in the Court of Appeals to undertake or request a reconsideration of the June 1, 1977, order. 606 F.2d at 432. Not only did the District Court not attempt to enter the proposed decree sua sponte, it was not even presented to the District Court by the plaintiffs. That Court, rather, on a motion of the defendants, held a pre-trial conference and set the case for trial. The Unions contend that the solution proposed in the dissenting opinion is not viable, in any event because it would require an amendment[1] to the

[1] The dissenting judges would require notice be given to members of Class 2. 606 F.2d at 431, fn. 3.

proposed decree to which the defendants, at this stage, have not consented.

In addition, the Unions contend that their right to withdraw consent to the entry of the proposed decree cannot seriously be questioned under the circumstances of this particular case. This Court need not determine, as suggested by the United States and the EEOC (Br. of U.S. at 18, fn. 14) that the question of appealability depends upon the consent of one's adversary, but rather can, and should, decide this case on the facts presented.

The proposed decree recites that the parties were "desirous of resolving all of the issues set forth in the complaint without the time and expense of further litigation . . ." (J.A. 25a) and that the defendants would provide certain relief to a class of plaintiffs "solely for the purposes of the settlement of this case and resolving the issues in the Complaint without the additional

expense of litigation . . ." (J.A. 26a). As a practical matter, the proposed decree has totally failed to achieve the essential purpose of the parties, that is, the avoidance of prolonged litigation. Approximately three and one-half years have passed since this decree was tendered. The parties have thus not avoided litigation and seemingly cannot unless permitted an opportunity to settle this case on terms acceptable to the District Court or to try the case on the merits. In any event, these purposes will not be served or achieved by a determination that the order refusing to enter the proposed decree is, or is not, appealable.

The parties are presently in a position in which performance under the decree is arguably possible, but the value of the plaintiffs' performance, i.e., the withholding of the pressing of their claims, has been virtually destroyed by the refusal of the District Court to enter the decree and by

the subsequent appeals. The defendants and plaintiffs, as well, have not saved the time and expense of protracted litigation, the expressed purpose of the proposed decree. Accordingly, under the doctrine of frustration of purpose, either party has the right to rescind. Williston on Contracts, 3rd Ed., § 1935. Clearly the failure to obtain the entry of the decree for some three and one-half years since its presentation was unforseeable and not the result of the fault of any party. Under these circumstances, any party may be excused from performance. See West Los Angeles Institute for Cancer Research v. Mayer, 366 F.2d 220 (9th Cir. 1966), cert. denied, 385 U.S. 1010 (1967).

Though the defendants' reasons for withdrawing consent to the proposed decree are not in the record, many of them are obvious or readily apparent. The proposed decree was negotiated without the benefit of the Court's decisions in International

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) and California Brewers Ass'n v. Bryant, ___ U.S. ___, 63 L. Ed. 2d 55 (1980). These two cases have contributed considerably to the state of the applicable law as it existed in early 1977. Given the nature of consent decrees and the type of negotiations which result in them, it is clear that the relative strengths and weaknesses of the parties' cases and the risks of going to trial are entirely different than they were prior to April 1, 1977, when the decree was presented. See, United States v. Armour & Co., 402 U.S. 673 (1971). The Unions' position is that recent developments in the law have put them in a substantially different posture than they were in when the proposed decree was presented, and that their withdrawal from a stale settlement proposal is entirely justified.

The argument of the Equal Employment Advisory Council ("EEAC") relative to the

appealability question under 28 U.S.C. § 1292(a)(1) emphasizes, perhaps unintentionally, the problem with the passage of time as it relates to the parties' evaluation of the risk of litigation. The EEAC argues that once the question of liability is decided by the trial court, it is highly unlikely that the parties or the court would be willing to agree to the terms of the "original consent decree" (Br. of EEAC at 13). This reasoning applies with equal force when a significant period of time has elapsed after agreement to the proposed decree. Just as the risks change after a district court has tried a case and decided the question of liability, the risks have changed here through the passage of time and the development that has occurred in the applicable law.

Implicit in the agreement to a consent decree was the expectation of the parties that the decree would be entered within a

reasonable time after it was proposed to the District Court. In this case, the parties contemplated that the proposed decree would become final within 65 days after tender, which was the time specified therein to provide appropriate notice to members of the class and to give them an opportunity to object pursuant to Fed. R. Civ. P. 23(e) (J.A. 30a-31a). More than three years have passed, however, and the decree has not been entered. By whatever standard is employed, the proposed decree was not made final within a reasonable amount of time after the parties proposed it to the District Court and therefore the withdrawal of consent to its entry in October, 1979, was manifestly justified.

The probable scenario for the immediate future makes the efficacy of the entry of the proposed decree even more unlikely. For example, should the Court hold that this case is not moot and that the June 1, 1977, order is appealable, the case must be remanded to

determine whether the trial court abused its discretion in refusing to enter the decree. If the Court of Appeals agrees with the plaintiffs and remands the case to the District Court for directions to enter the decree, many of its terms will have already expired. If the Court of Appeals should decide that the District Court did not abuse its discretion, the plaintiffs may attempt to return to this Court or they may seek to enter into another agreement with the defendants.

Additional justification for the withdrawal of consent by the defendants is suggested by the United States and the EEOC (Br. of U.S. at 18, fn. 14). These Amici assert that "unforseeable changed circumstances" might be sufficient reason for withdrawing consent. As stated, the assumption held by the parties in April 1977, was that the decree would be entered shortly after its presentation. Nothing could be

more unforseeable than the fact that the parties are now in the Supreme Court of the United States some three and one-half years later. It is all the more remarkable given that the case remains wholly unresolved, that the class of plaintiffs retain whatever rights and claims for relief they may have had at the time their suit was filed in October, 1975 and that, at this time, there is little hope of resolution of this case within the immediate future no matter what the result of this appeal. These serious problems were realized perhaps by the plaintiffs and the District Court at the time this case was set for trial the second time. Apparently, it did not occur to anyone at the November 15, 1979, pre-trial conference that entry of the proposed decree would be appropriate.

Since the defendants do not now consent to the entry of the decree, it may not be entered by the District Court even should

this Court determine the June 1, 1977, order to be appealable. Accordingly, there is not a live controversy with respect to this appeal within the meaning of Article III of the United States Constitution. This controversy is moot. Should the Court conclude that this appeal is not moot, then, in the alternative, the Unions adopt the position of American Brands as set forth hereinafter.

II. The District Court's Order Refusing Entry of a Proposed Consent Decree Is Not Appealable Under The Judicially Created "Collateral Order" Exception to 28 U.S.C. § 1291.

The Unions agree with the position taken in the Brief of Respondent, American Brands, Inc. Accordingly, the Unions will simply summarize that position as follows.

The finality requirement of 28 U.S.C. §1291 represents a legislative judgment that a succession of separate appeals from interlocutory orders would have a delibitating effect on judicial administration. The District Court's order rejecting a proposed consent decree does not come within the

small class of decisions excepted from the final judgment rule by the judicially-created "collateral order" doctrine.

The District Court's order does not satisfy any element of this Court's three-part collateral order test. First, the order did not conclusively determine any disputed question. Even assuming that there is a general right to settle litigation, nothing in the District Court's order precluded settlement at another time by the tendered decree or some alternative consent decree.

Second, the District Court's order did not resolve an important issue completely separate from the merits. Petitioners contend that the important collateral issue is the right to settle a Title VII class action under Weber (United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979)). The Weber opinion, however, was delivered two years after the District Court's order, was not considered by the courts below, and

is encompassed within the questions denied review by the Court in this case. Even assuming that Weber is applicable to settlement among parties in litigation, the District Court's order in this case of necessity involved considerations that were enmeshed in the factual and legal issues comprising petitioners' claims, and so no "collateral" rights were injured by the District Court's order. Furthermore, the importance of the right to settle Title VII actions is no different from the right to settle any other litigation, and a special exception to the final judgment rule for Title VII cases should not be created.

Third, the District Court's order is effectively reviewable, both before and after possible trial, and therefore fails to satisfy the final prong of the collateral order test. The same or alternative consent decree proposals could be presented by the parties for the Court's consideration at any

stage of the litigation. If none are accepted and the parties go to trial, any party could advocate on appeal therefrom the settlement alternative most favorable to its position. In situations where actual final determinations are made to the detriment of legitimate rights, immediate appellate review is available through certification or mandamus. In sum, no irreparable harm would flow from a decision holding the collateral order doctrine inapplicable and postponing the appellate review until final judgment.

III. The District Court's Order Refusing Entry Of The Consent Decree Is Not Appealable Under The Congressionally Created Exception To The Finality Rule, 28 U.S.C. § 1292(a)(1).

The Unions agree with the position taken in the Brief of Respondent, American Brands, Inc. Accordingly, the Unions will simply summarize that position as follows.

28 U.S.C. § 1292(a)(1), the statutory exception to the rule of finality held by

the Court of Appeals below to be inapplicable to the District Court's order rejecting a proposed consent decree, has always received a narrow interpretation by this Court. Postponing appellate review in this case presents no serious, irreparable consequences such as would warrant expansion of § 1292(a)(1).

After rejection of the tendered decree, petitioners remained fully able to obtain injunctive relief through alternative settlement proposals, a motion for injunctive relief, an award of injunctive relief following trial, or through imposition of such relief on appeal. Nothing in the opinions of the courts below foreclosed any of these opportunities to seek and obtain injunctive relief. The District Court's order thus produced no irreparable effect because it could be reviewed both prior to and after final judgment.

Denial of entry raised no serious or irreparable harm for the further reason that it did not dispose of any claims for injunctive relief. The District Court may have expressed an opinion concerning the lawfulness of the tendered decree, but it did not pass on the legal sufficiency of petitioners' claims for injunctive relief in any other form and under any other factual circumstances.

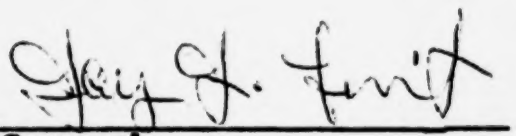
The narrow interpretation accorded § 1292(a)(1) by this Court has often followed from weighing the consequences of postponing appeal against the vital judicial interests militating against piecemeal review. The result urged here by petitioners would create the potential for multiple and unnecessary appeals, interjecting appellate courts indiscriminately into the trial process. The consequences of postponing appeal of an order rejecting a consent decree, on the

other hand, are minimal and remediable both prior to and after final judgment.

CONCLUSION

For the reasons presented, the decision of the Court of Appeals for the Fourth Circuit should be affirmed and the appeal dismissed.

LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION and TOBACCO WORKERS INTERNATIONAL UNION

By 
Counsel

Jay J. Levit
Imperial Building
Third Floor
422 East Franklin Street
Richmond, Virginia 23219

James F. Carroll
Air Rights Building, Suite 727E
7315 Wisconsin Avenue, N.W.
Washington, D. C. 20014

No. 79-1236

Supreme Court, U. S.
FILED
DEC 2 1980
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK L. CARSON, LAWRENCE HATCHER, and STUART E. MINES,
Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL UNION,
Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
HILL, TUCKER & MARSH
214 East Clay Street
P. O. Box 27363
Richmond, Virginia 23261
(804) 648-9073

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401
(703) 371-3700

JACK GREENBERG
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
Suite 2030
10 Columbus Circle
New York, New York 10019
(212) 586-8397

BARRY L. GOLDSTEIN
Suite 940
806 15th Street, N.W.
Washington, D.C. 20006
(202) 638-3278

Counsel for Petitioners

December, 1980

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
ARGUMENT.....	1
I. THE DISTRICT COURT'S ORDER REFUSING ENTRY OF THE PROPOSED CONSENT DECREE GRANTING PETITIONERS AN INJUNCTION IS APPEALABLE UNDER 28 U.S.C.§ 1291(a)(1) AS AN INTERLOCUTORY ORDER REFUSING AN INJUNCTION	1
A. The District Court's Order Determined the Merits of this Action	3
1. The District Court Would Not Have Considered De Novo The Grounds for a Preliminary Injunction	3
2. The District Court Would Not Have Reconsidered its Order	11
3. The District Court Passed on the Sufficiency of Petitioners' Claim for Preliminary and Permanent Injunctive Relief	15
B. The District Court's Order Could Not Be Reviewed Prior to Final Judgment	19

Page

C. The District Court's Order Will Cause Petitioners Irreparable Injury Unless An Immediate Appeal is Allowed 25

II. THE DISTRICT COURT'S ORDER IS A COLLATERAL ORDER WHICH IS APPEALABLE AS AN EXCEPTION TO 28 U.S.C.§ 1291 .. 31

A. The District Court's Order Conclusively Determined Important Interests of The Parties Concerning Settlement and the Use of a Remedial, Race-Conscious Affirmative Action Plan 31

B. The Order of the District Court Resolved Important Issues Completely Separate From the Merits of the Action 39

CONCLUSION..... 44

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	10
Baltimore Contractors v. Bodinger, 348 U.S. 176 (1955)	26,28
Barrett v. Roberts, 551 F. 2d 662 (5th Cir. 1977)	10
Bell v. Hood, 327 U.S 678 (1946)	40
Blackwelder Furn. Co., Etc. v. Seilig Mfg. Co., In., 550 F.2d 189 (4th Cir. 1977)	16
Carson v. American Brands, Inc., 446 F.Supp. 780 (E.D. Va. 1977)	31,33,40
Crowther v. Seaborg, 415 F. 2d 437 (10th Cir. 1969)	16
Dopp v. Franklin Nat. Bank, 461 F.2d 873 (2d Cir. 1972)	10,28
Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188 (1942)	4
Flinn v. F.M.C. Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976)	28

Page

Fullilove v. Klutznick, ___ U.S.___ 65 L.Ed. 2d 902 (1980) 20

General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932) 4

Greenspahn v. Joseph Seagram's Sons, Inc., 186 F.2d 616 (2d Cir. 1951) 43

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 10

Leighton v. New York S. & W.R.R., 306 F. Supp. 513 (S.D.N.Y.) (1969) 24

Messenger v. Anderson, 225 U.S. 436 (1912) 6

Morgenstern Chemical Co., Inc. v. Schering Corp., 181 F.2d 160 (3rd Cir. 1950) 4

Morse Boulger Destructor Company v. Fibre Mills, Inc., 239 F.2d 382 (3rd Cir. 1956) 43

Robbins Co. v. Laurence Mfg. Co., 482 F.2d 426 (9th Cir. 1973) 24

Rodgers v. U.S. Steel Corp., 541 F.2d 365 (3d Cir. 1976) 22

Southern Ry. Co. v. Clift, 260 U.S. 316 (1972) 6

Page

Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F. 2d 822 (2d Cir. 1963) 4,35,37

United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1989) 28

United Steelworkers of America v. AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) 28,32,33,37,38 39,41,42

Statutes and Rules:

28 U.S.C. § 1291 ..... 28,31,41,42, 43

28 U.S.C. § 1292(a)(1) 1,2,11,21,22, 24,25,26,28, 29,30,33,34, 42,43,

28 U.S.C. § 1292(b) 22,24,25

Title VII of the Civil Rights Act of 1964, as amended, 32 U.S.C. § 2000e et seq 10,14,16, 32,35

Rule 23(e), Fed. R. Civ. Proc. 19,23

Page

Other Authorities:

Moore's Federal Practice 6

Moore and Oglebay, The Supreme Court, Stare Decisis and Law of the Case, 21 Tex L. Rev. 514 (1943) 7

Vestal, Law of the Case: Single Suit Preclusion, 1967 Utah L. Rev. 1 7

Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199 (1969) 25

Note, Federal Appellate Jurisdiction - A District Court Order Disapproving A Proposed Settlment of A Class Action Is Not Appealable Under 28 U.S.C. § 1292(a)(1), 48 Geo. Wash. L. Rev. 456 (1980) 24

Note, Mandamus As A Means of Federal Interlocutory Review, 38 Ohio S.L.J. 301 (1977) 24

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1236

==========

FRANK L. CARSON, LAWRENCE HATCHER,
and STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., T/A THE
AMERICAN TOBACCO COMPANY; LOCAL 182,
TOBACCO WORKERS INTERNATIONAL,
TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

==========

ON A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

==========

ARGUMENT

I

THE DISTRICT COURT'S ORDER REFUSING ENTRY OF THE PROPOSED CONSENT DECREE GRANTING PETITIONERS AN INJUNCTION IS APPEALABLE UNDER 28 U.S.C. § 1292(a)(1) AS AN INTERLOCUTORY ORDER REFUSING AN INJUNCTION

Respondents contend in their Brief that the

order of the district court below refusing to enter the parties' jointly proposed consent decree enjoining defendants to refrain from discriminating against black workers (J. A. 26), and to institute employment practices set forth in Part III of the proposed consent decree (J. A. 27a-28a), was not an interlocutory order refusing an injunction within the intendment of 28 U.S.C. § 1292(a)(1). Four basic reasons were offered by respondents in support of the contention.

First, they claim that "(h)ad petitioners made application for preliminary injunctive relief, the District Court would necessarily have undertaken de novo consideration of the grounds alleged in support" (Resp. Br. at 30). Second, they assert that "(t)he District Court's order did not impair petitioners' ability to prove facts at trial which may have entitled them to injunctive relief" (Resp. Br. at 34). Third, respondents claim that "while the District Court may have expressed an opinion concerning the lawfulness of the tendered decree, it did not pass on the legal

sufficiency of petitioners' claims for injunctive relief" (Resp. Br. at 34-35). Fourth, respondents claim that the order of the District Court can be effectively reviewed after final judgment (Resp. Br. at 28). These claims of respondents have no basis in fact or law. As petitioners will demonstrate, proof of their validity depends either upon assumptions whose truth cannot be established or upon assumptions which are demonstrably false.

A. The District Court's Order Determined The Merits Of This Action

1. The District Court Would Not Have Considered De Novo The Grounds for a Preliminary Injunction

The first three claims of respondents have a common fallacy. Underlying each claim is the fallacious assumption that identification of an order as an interlocutory order refusing an injunction is a matter which is independent of the judge's conclusions of law and the rationale upon which the order is based. Petitioners submit, however, that the conclusions of law and the rationale of the decision must be taken

into account in determining whether an order constitutes an interlocutory order refusing an injunction. It cannot be emphasized too much that the status of an order as an interlocutory order refusing an injunction is determined by the nature and the effect of the order. See e.g. General Electric Co. v. Marvel Rare Metals Co., 287 U.S. 430 (1932); Ettelson v. Metropolitan Life Insurance Co., 317 U.S. 188, 192 (1942)("The statute looks to the substantial effect of the order made"). Also, see Morgenstern Chemical Co., Inc. v. Schering Corp., 181 F.2d 160, 162 (3rd Cir. 1950); Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F. 2d 822, 829 (2d Cir. 1963)(Friendly,J., dissenting).

Apart from a consideration of the purposes of the order and the specific relief granted by it, the only reliable gauge for measuring the nature and effect of an order is to examine the rationale given in support of the order and the conclusions of law and findings of fact accompanying it. When the district court's order below is considered in

this light, it becomes evident that respondents' objections to petitioners' characterization of the district court's order as an interlocutory order refusing an injunction, are without substance and can be shown to be false.

For example, consider respondents' contention that the district court, faced with a motion by plaintiffs for a preliminary injunction, would have considered de novo the grounds favoring the motion despite the rationale of its previous ruling rejecting the proposed consent decree.

Respondents, of course, cite no authority for this proposition and petitioners have found none. The vice in the argument, apart from the fact that it strains credulity, is that it fails to take into account both the stare decisis effect of the earlier decision and the general principle that district courts are obligated to apply their earlier rulings as the law of the case.

For example, Professor Moore, in his Trea-

tise on Federal Practice, states that

> When, therefore a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a predecent for subsequent cases under the doctrine of stare decisis, but, as a general proposition, it establishes the law, which other courts owing obedience to it must, and which it itself will, normally apply to the same issues in subsequent proceedings in that case.

Vol. 1B, ¶ 0.404(1), pp. 402-403. While it is true, as stated by this Court in Messenger v. Anderson, 225 U.S. 436, 444 (1912), that "the phrase, 'law of the the case' as applied to the effect of previous orders on the later action of the court rendering them in the same case merely expresses the practice of courts generally to refuse to reopen what has been decided, not, a limit to their power", still it would be a foolish litigant who, without reason to expect otherwise, proceeded upon the assumption that a court would do in the future what it has expressly stated in the past that it would not do. See also, Southern Ry. Co. v. Clift, 260 U.S 316, 319 (1972). Generally, see Moore and Oglebay,

The Supreme Court, Stare Decisis and Law of the Case, 21 Tex. L. Rev. 514 (1943); Vestal, Law of the Case: Single Suit Preclusion, 1967 Utah L. Rev. 1. What determination would have been made by the district court below if confronted with a motion by plaintiffs for summary judgment, is a matter which must be decided, in the first instance, in light of what that court has previously decided and said.

At the time when the district court made its order below, it was accepted by all sides, including the district court, that prior to September 1963, regular job classifications in the Richmond Leaf Plant such as truck driver, watchman, maintenance storage, and boiler operator, were reserved for white workers. See Carson v. American Brands, Inc., 446 F. Supp. 780, 782 (E.D. Va. 1977). It was also accepted by the district court that there were, in early 1976, 15 white watchmen and only one black watchman.[1/] Id.

1/ With respect to the other job categories, the

The district court further assumed, in denying approval of the proferred consent decree, that only 20% of the supervisory positions at the respondent American Brands' Richmond Leaf Plant were staffed with black employees as of April 1976. 446 F. Supp. at 783. Prior to September 1963, supervisory positions were restricted to white personnel. See answer #14a of Respondent American Brands' Answer to Petitioners' Second Set of Interrogatories, P. 29. The seasonal workers have traditionaly been black employees. Id. at 27-28. Also, see Carson v. American Brands, Inc., 446 F. Supp. at 782. Jobs held by seasonal employees are identical or similar to those held

---

1/ (continued)

racial distribution in February 1976 was as indicated on the chart below:

Position	Whites	Blacks
Truck Drivers	5	4
Maintenance Storage	1	0
Boiler Operators	0	3

See Carson v. American Brands, Inc., 446 F. Supp. at 782.

by regular employees. See American Brands' Memorandum in Support of Entry of Proposed Consent Decree. (J.A. 38a). As stated by respondent American Brands, Inc., "seasonal employees become familiar with permanent job classifications by working in close proximity to such jobs held by regular employees." Id. The district court also assumed that in 1976, there were 37 (39.4%) regular white employees, 57 (60.6%) regular black employees, and 135 seasonal employees. 446 F. Supp. at 782. This implies, of course, that, in 1976, only 6.25% of the watchmen were black and only 20% of the supervisors were black although 60.6% of the regular employees were black.

On these assumed facts,the district court held that it did not perceive any vestiges of discrimination. 446 F. Supp at 790. Moreover, the district court's holding was adopted in the face of the parties' assurance that the proposed consent decree was intended to overcome the vestiges of racial discrimination. Id.

This holding was a mixed conclusion of law and finding of fact. It constituted, however, the law of the case. As such, it bound the district court, in the absence of special circumstances, to decide the merits of any request for a preliminary injunction in accordance with its holding that there were no vestiges of racial discrimination. Application of this holding as law of the case would, however, render it impossible for petitioners to satisfy their burden, as the movant for a preliminary injunction, to establish a substantial likelihood that they would prevail on the merits, see e.g., Dopp v. Franklin Nat. Bank, 461 F.2d 873, 878 (2d Cir. 1972); Barrett v.Roberts, 551 F.2d 662, 665 (5th Cir. 1977), or even that they could meet their initial burden of making out a prima facie case of employment discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

2. The District Court Would Not Have Reconsidered Its Order

Apparently anticipating petitioners' argument concerning this rather straightforward application of the law of the case doctrine, respondents suggest in their brief that this result can be avoided by the "District Court reconsideration of the proposed order" (Resp. Br. at 31). It is clear, however, that the appealability of an order under 28 U.S.C. § 1292(a)(1) can not possibly turn upon whether or not the losing party moves for reconsideration. This is especially the case, where, as here, there is no basis for assuming that the district court would have, in fact, reconsidered its original decision.

Besides the district court's conclusion concerning the nonexistence of any vestiges of racial discrimination, there are other aspects of the court's order which would also operate to bar the granting of a motion for preliminary injunction. For example, provisions 1, 2, 3, and 4 of Part III of the proposed consent decree make certain

benefits available to seasonal workers. (J.A. at 27a-28a). The district court objected, however, to inclusion of the provisions in the proposed decree on the ground that "the pool of employees benefiting from this provision, that is seasonal employees, has been traditionally and are now all black...(and therefore) that benefits are being bestowed on the basis of race". 446 F. Supp. at 788. The court adhered to this conclusion despite its own recognition that "legitimate nonracial business reasons may underlie such a decision".[2/] Id.

2/ Respondent American Brands, Inc., in its Memorandum in Support of Entry of Proposed Consent Decree, made the following statement about provisions 1, 2, and 3 of Part III of the proposed consent decree.

> There is sound business reasoning behind this practice. Many of the jobs held by regular employees are similar or identical to jobs held by seasonal employees. Also, seasonal employees become familiar with permanent job classifications by working in close proximity to such jobs held by regular employees. This being the case, seasonal employees provide the Company with a ready pool of experienced employees who are better qualified to fill

In light of this determination by the district court, a motion by petitioners for a preliminary injunction enjoining respondents to grant the plaintiff class of seasonal workers the aforementioned relief would have been denied since the district court would have conceived

---

2/ (continued)

> vacancies in regular employment than would be outside hire. Finally, it is fair and equitable to allow qualified seasonal employees the initial opportunity to transfer to regular job vacancies. (J.A. at 38a).

Similarly, with respect to provision 4 of Part III, respondent American Brands, Inc., stated:

> Paragraph 4 is redundant of Paragraph 3 inasmuch as the job classification of Watchman is considered an hourly paid permanent production job. The practice of defendant Company is and has been however, to canvass only the most senior seasonal employees for interest in filling a permanent vacancy in the job of Watchman when no regular employee signs a posting for such vacancy. If none of the employees canvassed is interested, it has been the practice to fill the vacancy with an outside hire. This practice of canvassing only the most senior

the granting of any such relief to be equivalent to granting a remedy on racial grounds. The judgment of the district court that "preferential treatment on the basis of race ... violates the Constitution and Title VII" would thus have been decisive. Moreover, the earlier conclusion of the court that there were no vestiges of prior racial

---

2/ (continued)

> seasonal employees for interest in a permanent vacancy in the job of Watchman is supported by the real need to fill such vacancies with individuals who want to be watchmen. As of March 1, 1977, the inventory of stored tobacco at defendant Company was 138, 583,770 pounds having a value of $214, 113,265. The experience has been that seasonal and regular employees have been reluctant to take this job on a permanent basis because of the night, weekend and holiday work which is required. Also, the Company wants to avoid the problem of very junior seasonsonal employees taking the job for this limited purpose of obtaining regular employment from which he or she can bid on vacancies in permanent production job classifications, thus, in effect, by-passing all the more senior seasonal employees. However, for purposes of settling this lawsuit, the defendant Company has agreed to discontinue this practice. (J.A. at 38a-39a).

discrimination would serve to reinforce the court's objections for denying a request for a preliminary injunction. In either case, it seems clear, as a practical matter, that there would not be any "de novo consideration" by the district court of either the basis for its previous ruling or of the grounds offered in support of a motion for a preliminary injunction.

3. The District Court Passed on the Sufficiency of Petitioners' Claims for Preliminary and Permanent Injunctive Relief.

These considerations also show that respondents err when they allege that "while the District Court may have expressed an opinion concerning the lawfulness of the tendered decree, it did not pass on the legal sufficiency of

---

2/ (continued)

It should be noted here that there is not, in these comments of respondent American Brands, any suggestion that seasonal employees are not capable of performing the responsibilities assigned to watchmen.

petitioners' claim for injunctive relief" (Resp. Br. at 34-35). Even the most cursory, and charitable, review of the district court's order will indicate that the court's conclusions with respect to the absence of any vestiges of discrimination and the impropriety of granting judicial relief which would benefit the class of seasonal workers, are judgments which tend to show the insufficiency of a claim by petitioners for preliminary injunctive relief. Since both conclusions affect adversely the ability of petitioners to establish a prima facie claim, they tend to prove the insufficiency of both a claim for preliminary injunctive relief as well as petitioners' overall Title VII's claims. See Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969); Blackwelder Furn. Co, Etc. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 197 (4th Cir. 1977).

Respondents are much too ingenuous in their argument. They seek to draw a distinction between the expression of an "opinion concerning the lawfulness" of the parties' requested claim for

injunctive relief, as embodied in the proposed consent decree, and the "pass(ing) on the legal sufficiency of petitioners' claim for injunctive relief". Whatever the differences are which might generally be drawn between the two actions, it is plain here that those differences will be nil when, as here, the court's opinion is so expansive that it analyzes and decides what would also be the merits of a claim for injunctive relief.[3/]

Respondent's confusion on this point can

3/ This analysis also shows, contrary to respondents' assertion, that the order of the district court did "impair petitioners' ability to prove facts at trial which may have entitled them to injunctive relief". (Resp. Br. at 34). It cannot be gainsaid that the district court's belief that judicial relief on behalf of seasonal workers is tantamount to unlawful discrimination on the basis of race, has an adverse impact upon petitioners' efforts to obtain judicial relief for the class of seasonal employees. Indeed, respondents' actions, following the announcement of the district court's opinion, seemed to constitute a recognition of the various hazards which petitioners would face in seeking to establish their claims in the district court. Indeed that recognition may well have been a causative factor inducing them to object to the appeal of this action to the Fourth Circuit. See J.A. at 4-6. Similarly the district court's finding that there were no vestiges of prior

be traced to their failure to appreciate that what, in part, made the district court's order an interlocutory order passing on the sufficiency of petitioners' injunctive claim was the refusal by the district court, as indicated by the opinion, to limit its decision to factors which concerned the propriety, or impropriety, of approving the proposed consent decree. Rather the court used its opinion to address issues affecting ultimate resolution of the merits of the action.

For instance, the district court's decision on whether relief could be granted to seasonal employees or on whether the pre-1963 segregation of jobs by race constituted evidence of the existence of vestiges of prior racial discrimination (when considered in conjunction with a work force in which blacks comprised 20% of the production supervisors and 6.25% of watchmen while

---

3/ (continued)

racial discrimination, would also hamper petitioners' ability to prevail at trial.

constituting the vast majority of new hires since 1971, 446 F. Supp. at 783 (J.A. at 36a-37a, 47a)), has a bearing on the merits of the lawsuit. It was the district court's excursion into these and other areas which transformed the opinion and order of the court into something more than a decision under Rule 23(e), Fed. R. Civ. Proc., and projected it instead into a determination on matters affecting the merits of petitioners' claims for preliminary and final injunctive relief.

3. The District Court's Order Could Not Be Reviewed Prior to Final Judgment

Respondents also contend that "the parties could have presented the same or alternative proposals at any stage in the proceedings".[4/]

4/ This contention fails to recognize the far-reaching nature of the district court's conclusions. The decision was of such wide scope that it eliminated a broad range of settlement proposals. For example, it eliminated the possibility that a remedial, race-conscious, affirmative action program could be embedded into a consent decree. See Carson v. American Brands, Inc., 446 F. Supp. at 789-790.

(Resp. Br. at 29). This point was offered in support of their more general thesis that the district court's order rejecting the proposed settlement was one which could be reviewed subsequent to final judgment. (Resp. Br. at 28-30).

4/ (continued)

Similarly, the order precluded the possibility that the consent decree could be fashioned to improve the position of seasonal workers as a class. Clearly, the district court would have assumed that any relief of this kind would constitute, given the racial composition of the class of seasonal workers, an unlawful racial preference. 446 F. Supp. at 788-789.

The elimination of any form of remedial relief for seasonal workers of this description or remedial relief to black workers went, of course, to the heart of any possible settlement of the action.

Moreover, the district court's insistence that the relief must not cause what it termed harm to "innocent third parties" also reduced the allowable scope of acceptable compromises. 446 F. Supp. at 786, 790. Also, the district court's concern with the impact of the settlement decree upon "innocent parties" is far different than the way in which this Court has considered the problem. Only recently, this Court said, in Fullilove v. Klutznick, ___ U.S. ___, 65 L.Ed.2d 902, 928 (1980), that

Quite obviously, it would be meaningless to present to the district court for approval the same proposals which it so emphatically rejected. Moreover, nothing in the history and meaning of 28 U.S.C. § 1292(a)(1) requires adoption of such a meaningless gesture. Petitioners and respondents were entitled to assume that the opinion of the district judge stated his actual assessment of the legal issues and further to assume that the assessment, would constitute the law of the case. Thus, it was quite unrealistic to assume that the court's order was not final, and that it would be reviewed again by the district judge.

As a further argument in support of their contention that the district court's order could be "reviewed both prior to and after final

---

4/ (continued)

> Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

judgment" (Resp. Br. at 28), respondents claim that "there remained other means of obtaining injunctive relief short of trial and post-judgment review". (Resp. Br. at 30). Two of the other means were identified by respondents. They were (1) "a request for certification under 28 U.S.C. § 1292(b)" and "a writ of mandamus". (Resp. Br. at 30). Petitioners, however, submit that the construction and application of 28 U.S.C. § 1292 (a)(1) are not, in general, to be determined by the availability of review pursuant to a writ of mandamus. On the other hand, review by certification under 28 U.S.C. § 1292(b) is dependent upon the unavailability of review under § 1292(a)(1).

Respondents cite the decision of the Third Circuit in Rodgers v. U.S. Steel Corp., 541 F.2d 365 (3d Cir. 1976) for the proposition that the district court's order could be reviewed by writ of mandamus. This decision, however, supports petitioners' argument, not that of respondents. In its opinion, the Third Circuit states conditions under which review by mandamus is pos-

sible. It says that:

> (R)eview by mandamus may be available in those rare instances where a district court has acted outside the scope of its jurisdiction or arbitrarily and in disregard of appropriate procedural safeguards...

541 F.3d at 372.

This standard is not satisfied in the instant action. Petitioners do not claim that the district court's actions are outside its jurisdiction. Nor do petitioners claim that the district court's order violated procedural safeguards. Petitioners have, at all times, limited their claim to the allegation that the district court failed to apply applicable principles of law in determining whether the parties' proposed joint settlement decree should be approved pursuant to Rule 23(e) of the Fed. R. Civ. Proc. A district court's failure to apply correct legal principles to a case before it does not make the resulting orders reviewable thereby pursuant to a writ of mandamus.

Similarly, review by certification pursuant

to § 1292(b) is unavailable. This route of review has, more over, been severely restricted by the cases. For example, it has been stated that review by certification should be granted only in extraordinary cases where necessary to avoid protracted and expensive litigation, Robbins Co. v. Laurence Mfg. Co., 482 F.2d 426, 429 (9th Cir. 1973), or where there exists unusual circumstances warranting such review. Leighton v. New York S. & W. R. R., 306 F. Supp. 513, 515 (S.D.N.Y. 1969). See generally, Note, Federal Appellate Jurisdiction - A District Court Order Disapproving A Proposed Settlement of a Class Action Is Not Appealable Under 28 U.S.C.§ 1292(a)(1), 48 Geo. Wash. L. Rev. 456 (1980). See generally, Note, Mandamus As A Means of Federal Interlocutory Review, 38 Ohio S.L.J. 301 (1977). No unusual circumstances exist here. Nor is this an extraordinary case or one where the litigation is especially protracted or expensive. Finally, it has been stated that § 1292(a)(1) and 1292(b) are mutually exclusive. See Wright, The Inter-

locutory Appeals Act of 1958, 23 F.R.D. 199, 202 (1969). Indeed, § 1292(b) states explicitly that it is applicable only when an order is "not otherwise appealable under this section".

C. The District Court's Order Will Cause Petitioners Irreparable Injury Unless An Immediate Appeal Is Allowed.

Respondent's argument against allowance of an appeal under § 1292(a)(1) of the district court's order below, is also based upon a claim that irreparable injury will not result to petitioners if the appeal is disallowed. The merits of this argument can perhaps best be considered by examining the relationship between orders encompassed by § 1292(a)(1) and the requirement of irreparable injury. If an order has been shown to be within the scope of § 1292(a)(1), then it is not necessary to make a further showing of the existence of an irreparable injury. The irreparable injury is, in this instance, simply assumed as a result of the order's inclusion within

§ 1292(a)(1).[5/]

In short, there is no need to make a judicial assessment of the existence of an irreparable injury if the order falls within the scope of § 1292(a)(1). Such an assessment is only required where a doubt exists concerning the applicability of § 1292(a)(1) to a particular order or class of orders. When such an eventuality occurs, consideration must then be given to whether orders of that category are generally likely to cause irreparable injury in the absence of an immediate appeal.

Now, the order under consideration in the present action is an interlocutory order refusing to approve a proposed consent decree enjoining respondents from further violations of Title VII's

---

5/ For example, interlocutory orders denying a request for a preliminary injunction are within the intendment of § 1292(a)(1). Baltimore Contractors v. Bodinger, 348 U.S. 176, 182 (1955). When an order denying a preliminary injunction is issued by a district court, it is therefore not necessary to make an independent judicial assessment of whether the order causes an irreparable injury in the particular case.

ban against employment discrimination based upon race. The district court's order, however, has the effect of permitting respondents to continue with their alleged discriminatory practices until final judgment is rendered. The order is indifferent to the impact which the alleged discriminatory practices have upon petitioners since the district court does not believe that there are any vestiges of racial discrimination at the Richmond Leaf Plant.

The effects of the order, however, are severe. For example, as a consequence of the order, seasonal workers are denied, until the completion of trial, the experience, knowledge, training, longevity, skills, and recognition which they would have acquired, through approval and enforcement of the proposed consent decree, as regular employees, watchmen, boiler operators, track drivers, production supervisors, etc. Since the extent of the delay of the trial cannot be calculated, there is no way to specify precisely the scope and magnitude of this injury. The

harm meanwhile caused to the plaintiff class of seasonal workers, however, will be irreparable.[6/] The resulting loss of experience, skills, knowledge, and job tenure, will place these workers at a competitive disadvantage with respect to other workers inside, and outside, the Richmond Leaf Plant.[7/]

6/ In the context of an appeal taken pursuant to 28 U.S.C.§ 1291 by means of the collateral order exception, the irreparable injury, besides including the loss of competitive advantage and the loss of rights sanctioned by United Steelworkers of America v. AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979), would also include the loss of the right to settle the lawsuit without trial as well as the incurring of additional expense and loss of time.

7/ In this context, it should be remembered that § 1292(a)(1) was designed to "permit litigants to effectively challenge interlocutory orders of serious, perhaps irreparable consequence." Baltimore Contractors, Inc., v. Bodinger, 348 U.S. 176, 181, (1955).

Neither in an appeal of an order denying a preliminary injunction nor in an appeal of the district court's order below is there a necessity to make a final determination of the merits. In both cases a preliminary assessment of the merits will suffice. Compare, for example, Dopp v.

This injury is precisely the type of injury which a preliminary injunction is designed to thwart. The same considerations which presume the existence of irreparable injury when a preliminary injunction is denied argue here for the application of § 1292(a)(1). See e.g., United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980).

The district court's denial of the motion for approval of the proposed consent decree also caused irreparable injury by denying the parties their only meaningful chance of settlement. It damaged thereby the public and private interest in the use of voluntary settlements. The court's judgment operated, through the use of erroneous legal principles,to diminish substantially the amount of maneuvering room needed for agreement on mutually acceptable compromises. Moreover, it threatens to unduly affect the petitioners' pre-

---

7/ (continued)

Franklin National Bank, 461 F.2d 783 (2d Cir. 1972) with Flinn v. F.M.C. Corporation, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976).

paration for trial and chances for recovery. Injury of this quality and magnitude is certainly irreparable to the petitioners.

Finally, the order caused irreparable injury to the public interest since disallowance of an immediate appeal will grant district courts an essentially unreviewable power to coerce parties into fashioning proposed settlements decrees which reflect the district court's erroneous conceptions of applicable legal principles. This could easily lead to widespread enforcement by the district courts of settlement decrees totally at variance with constitutional and other federal values. Respondents' arguments would support such a result and therefore should be rejected. For the reasons stated herein, the judgment below should be reversed and petitioners should be granted their right to appeal the district court's order pursuant to 28 U.S.C. § 1292(a)(1).

II

THE DISTRICT COURT'S ORDER IS A COLLATERAL ORDER WHICH IS APPEALABLE AS AN EXCEPTION TO 28 U.S.C. § 1291

Respondents contest petitioners' characterization of the district court's order as a collateral order appealable as an exception to 28 U.S.C. § 1291 under the rule announced in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). It is respondents' position that the order did not conclusively determine any collateral interests, that it did not resolve any issues which were completely separate from the merits, and that it was effectively reviewable upon the rendering of final judgment herein.

A. The District Court's Order Conclusively Determined Important Interests of the Parties Concerning Settlement and the Use of A Remedial, Race-Conscious Affirmative Action Plan.

With respect to § 1291, the nature and effect of the district court's decree was to determine three issues of critical importance to the parties. First, the decree, as previously mentioned, prejudged certain issues on the merits, such as

whether there were vestiges of prior racial discrimination or whether race-conscious remedial programs violated the Constitution and Title VII of the Civil Rights Act of 1964, as amended, or whether judicial relief awarded to seasonal workers as a class would per se constitute discrimination against white employees. Second, the district court's decree deprived the parties of the opportunity to settle the litigation and thereby avoid an unnecessary waste of money, time, and resources.

Third, the district court's order deprived the parties of the right which this Court recently affirmed, in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, to exist for unions, employees, and employees with respect to industries in which there has existed a traditional pattern of segregation and discrimination against minorities, namely, a right to adopt and implement voluntarily a remedial, race-conscious affirmative action plan designed to "break down old patterns of racial segregation and hierarchy", to "open

employment opportunities for Negroes in occupations which have been traditionally closed to them", and "to eliminate a manifest racial balance" " and not "to maintain racial balance." United Steelworkers of America,AFL-CIO-CLC v. Weber, supra, 443 U.S. at 208.

The first mentioned effect concerns the merits of the action and thus is particularly applicable to appeals under § 1292(a)(1). The last two effects, however, involve collateral issues that are separate and apart from the merits. They are relevant to the issue of appealability under the collateral order exception articulated in Cohen v. Beneficial Indus. Loan Corp., supra. 9/

9/ Respondents' failure to recognize the three distinct effects of the district court's order is apparently responsible for their inability to understand how the order below can simultaneously be appealable both as a collateral order and as an interlocutory order denying injunctive relief. They seem to assume that reconciliation of these two positions is "schizophrenic" since in their mind "a single court order cannot simultaneously be 'collateral to' the claim, as required by the collateral order doctrine, while at the same time

It is these last two effects of the district court's order which respondents claim were not conclusive determinations.

It is, of course, true, as respondents contend, that the district court's order did not

---

9/ (continued)

'affecting the merits' of petitioners' claims and passing on the legal sufficiency of any claims for injunctive relief', as required for appealability under § 1292(a)(1)." (Resp. Br. at 32, n. 18).

But surely, there can be no difficulty in comprehending how a single court order, composed of several different components, can have several distinct effects. Nor is it incomprehensible that each of these distinct effects, or components, might affect different things differently or that one effect might concern the merits of a claim while another effect might be totally extraneous to the merits. Such possibilities exist whenever there is a single order which decides distinct issues.

The critical question is not whether there is a single order but rather "What did the single order decide and for what were the issues decided relevant?" These questions are not answered, as respondents suggest, by looking to see if the order is in some sense unitary, but rather they

operate to preclude every imaginable type of settlement but surely such an extreme result is not required by the Cohen rule. The finality achieved by the district court's order with respect to the parties' interests in settlement of the litigation was primarily caused by the court's invocation of an erroneous set of legal principles to close off areas of settlement opportunities. As Judge Friendly noted in his dissenting opinion in Stewart-Warner Corp. v. Westinghouse Electric Corp., 325 F. 2d 822,829 (2d Cir. 1963):

> The danger of serious harm from the court's erroneous belief in the existence of a legal barrier to its entertaining a claim for an injunction has been thought to outweigh the general undesirability of interlocutory appeals.

Settlement opportunities were foreclosed by the district court's order in several ways. First, the court held, as a matter of law, that "(p)referential treatment on the basis of race... violates the Constitution and Title VII". 446

7/ (continued)

are answered by looking at the nature of the relief provided by the order and the nature of the conlusions of law and findings of facts, if any, upon which the order was based.

F. Supp. at 788. Second, the court found, as a mixed issue of law and fact, that, despite the history of discrimination, there were no vestiges of racial discrimination at the Richmond Leaf Plant. Id. at 790.

Third, the court concluded that relief on behalf of the plaintiff class of seasonal employees could only be given if members of the class were shown to have been prior victims of racial discrimination at the Plant. 446 F. Supp. at 786. And fourth, the court found that settlement agreements which either failed to include findings of prior racial discrimination or which included general exculpatory clauses concerning discrimanatory practices, cannot serve as the basis for a consent decree. 446 F. Supp. at 788-789.

Each of the above holding was made as a matter of law. Judicial holdings as to what the law is necessarily must be taken as conclusive determinations. The existence of avenues for obtaining reconsideration is irrelevant to this issue. Indeed, it was the finality of a court's legal conclusions, compared to its discretionary

findings that made Judge Friendly in Stewart-Warner Corp. v. Westinghouse Electric Corp., supra, emphasize how important it was to recognize the

> "distinction...between a 'refusal' based on an allegedly erroneous conclusion that the law does not permit the claim for an injunction to be heard in the action...and one based on alleged abuse of a discretionary power over the scope of the action", 325 F.2d at 829.

Moreover, as he pointed out "The very fact that... (an) order hinges on the trial court's discretion is itself an indication that such orders...carry a lesser threat of harm". Id. Applying Judge Friendly's analysis to the facts here, it is plain that the holding of the district court below is not based upon the exercise of discretionary power but rather is based upon the court's ascertainment of what it perceives to be the governing principles of law.

The district court's order was clearly a conclusive determination of the parties' right to do, whether in or out of court, what this Court sanctioned in United Steelworkers of America,

AFL-CIO-CLC v. Weber, supra, i.e., the right to institute a race-conscious, remedial affirmative action program. The district court's determination of the issue is separate from its refusal to enter a judicial decree incorporating the settlement terms arrived at by the parties. In light of the district court's opinion, there can be no question but that an out-of-court agreement between the parties, which incorporated the terms of the proposed consent decree, would be vulnerable, unlike the one upheld in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra, to a successful judicial challenge in the district court at the hands of dissatisfied white regular employees. This consequence of the order demonstrates the extent to which it not only constituted a final determination of certain collateral issues but also shows the extent to which the order undercuts the rights of workers and employers to use agreements produced out of court to remedy racial imbalance in historically segregated industries by the establishment of

corrective, voluntary, race-conscious affirmative action programs. See e.g., United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

B. The Order of the District Court Resolved Important Issues Completely Separate From the Merits of the Action

In lieu of what has been said in the previous section concerning the finality of the district court's order with respect to its determination of purely legal issues, it follows that the collateral issues determined by the order are separate and apart from the merits of the lawsuit. As indicated previously, these collateral issues concern (1) the parties' interests in settling their lawsuit without tailoring the settlement to reflect erroneous conceptions by the district court of the relevant legal principles and (2) their right to adopt, whether in or out of court, an affirmative action program conforming to guidelines set forth by this Court in United Steelworkers of America, AFL-CIO-CLC v. Weber, supra.

Respondents object to identification of these interests as collateral matters within the scope of the Cohen rule. First, they claim that the "'right' to settle pursuant to the tendered decree...is an issue encompassed within the 'abuse of discretion' questions expressly excluded from the grant of certiorari in this case" (Resp. Br. at 13). This objection misses the point. Petitioners are not asking the Court to confirm, or decide, that such rights, or interests, exist but rather they assert only that the allegation of the existence of such interests, or rights, is sufficiently substantial to permit invocation of the collateral order doctrine. See e.g., Bell v. Hood, 327 U.S. 678 (1946). Where-as here-appealability is based upon the collateral order exception, a decision upholding appealability does not necessarily imply that the Court recognizes the existence of the alleged collateral rights, or interests. A decision favoring appealability means only that the Court agrees that the alleged collateral interests are sufficiently substantial

to warrant inquiry for the purpose of determining whether the claim, if made out, would constitute a cause completely separate and apart from the merits of the action to invoke the exception to § 1291 permitted under Cohen v. Beneficial Loan Corp., supra.

Respondents also allege that this Court's decision in Weber, supra, failed to establish the existence of a right to settle a lawsuit (Resp. Br. 13-15). While technically, this is correct, it nonetheless remains true that the Court's decision in that case actually precluded a collateral attack, by a third party, on the validity of an out-of-court agreement. Thus the Court's action indirectly constituted judicial support and sanction for the out-of-court agreement. The decision in Weber, therefore, recognized the right of unions, employers, and employees to fashion, out-of-court, remedial, voluntary, private affirmative action agreements which can be protected against undue judicial interference. In essence, Weber recognized the

legitimacy of the interests of private parties in entering into private, race-conscious, voluntary affirmative action programs.

This interest is, of course, distinct from the interests which parties have in settling an on-going lawsuit. Although the decision in Weber may not be directly applicable to this latter issue, it is relevant to it. To the extent that a settlement of a pending case parallels that of the agreement in Weber, supra, the validity of the settlement is governed by the principles set forth in Weber, supra.

Petitioners, in their previous Brief, demonstrated that the collateral issues discussed here are separate from the merits of this action. That discussion need not be repeated here. In this Reply Brief, petitioners have also demonstrated that the district court's order caused them to suffer irreparable injury. That argument, which was made with respect to § 1292(a)(1) is equally applicable to § 1291, and for that reason also need not be repeated.

Similarly, the arguments concerning reviewability of the district court's order, were also made in petitioners' Brief and are not repeated here. Moreover, the arguments, which were made in the instant brief, under § 1292(a)(1), on the issue of reviewability, are readily translatable to § 1291. These arguments, considered separately and collectively, require that judgment below be dissmissed and that petitioners be allowed to appeal the district court's judgment as an exception to the requirements of § 1291 in accordance with the Cohen rule.[10/]

10/ The respondent unions' argument that the action is moot because they have withdrawn their consent to the proposed decree is frivolous. See Morse Boulger Destructor Company v. Camden Fibre Mills, Inc., 239 F. 2d 382, 383 (3rd Cir. 1956); Greenspahn v. Joseph Seagram ' Sons, Inc., 186 F. 2d 616, 619-621 (2nd Cir. 1951). No action has been taken by the district court on the respondent unions' motion to withdraw their consent to the proposed decree. Accordingly, this Court, being vested with jurisdiction of the case, has the power to define the circumstances under which respondent unions' consent to the proposed consent decree can be withdrawn.

CONCLUSION

For the reasons indicated herein the decision below should be vacated with instructions to allow the appeal.

Respectfully submitted,

HENRY L. MARSH, III
WILLIAM H. BASS, III
RANDALL G. JOHNSON
Hill, Tucker & Marsh
214 East Clay Street
P.O. Box 27363
Richmond, Virginia 23261
Tel: (804) 648-9073

JOHN W. SCOTT, JR.
615 Caroline Street
Fredericksburg, Virginia 22401
Tel: (703) 371-3700

JACK GREENBERG
Counsel of Record
JAMES M. NABRIT, III
NAPOLEON B. WILLIAMS, JR.
10 Columbus Circle
Suite 2030
New York, New York 10019
Tel: (212) 586-8397

BARRY L. GOLDSTEIN
806 15th Street, N.W.
Suite 940
Washington, D.C. 20006
Tel: (202) 638-3278

Counsel for Petitioners

Supreme Court, U.S.
FILED
SEP 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL; TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
JEFFREY C. McGUINESS
McGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	6
THE ORDER REFUSING ENTRY OF THE CONSENT DECREE AS UNLAWFUL IS APPEALABLE AS A MATTER OF RIGHT UNDER 28 U.S.C. §§ 1291 AND 1292(a)(1)	6
A. The District Court's Refusal to Enter The Consent Decree Is Appealable Under 28 U.S.C. 1292(a)(1) As An Order Denying An Injunction	6
B. The Order Refusing Entry Of The Consent Decree Is Appealable As a Collateral Order Under 28 U.S.C. § 1291	16
CONCLUSION	22

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 6

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 6

Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955) 7, 10, 14

Carson v. *American Brands, Inc.*, 466 F. Supp. 780 (1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3813 (1980) .. 8

Catlin v. *United States*, 324 U.S. 229 (1945) 17

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) 5, 6, 17, 19, 20

Commonwealth of Pennsylvania v. *Local Union 542, Int'l Union of Operating Engineers*, No. 71-2698 (E.D.Pa.), order dated November 7, 1979 .. 15

Coopers & Lybrand v. *Livesay*, 98 S. Ct. 2454 (1978) 14, 19

Dayton Board of Education v. *Brinkman*, 433 U.S. 406 (1977) 13

Eisen v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) .. 16, 18

Equal Employment Opportunity Commission v. *International Longshoremen's Association*, 511 F.2d 273 (5th Cir. 1975) 8, 10

Florida Trailer and Equipment Co. v. *Deal*, 284 F.2d 507 (5th Cir. 1960) 14

Gardner v. *Westinghouse Broadcasting Co.*, 98 S. Ct. 2451 (1978) 2, 10, 11

Gillespie v. *United States Steel Corporation*, 379 U.S. 148 (1964) 18

Goldstein v. *Cox*, 396 U.S. 471 (1970) 10

Great American Federal Savings & Loan Association v. *Novotny*, 99 S. Ct. 2345 (1979) 2, 3

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 (1977) 3

Land v. *Dollar*, 330 U.S. 731 (1947) 18

Lewis v. *Tobacco Workers International Union*, 577 F.2d 1135 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979) 7, 9

TABLE OF AUTHORITIES—Continued

Page

Liberty Mutual Insurance Company v. *Wetzel*, 424 U.S. 737 (1976) 10, 19
Mercantile National Bank at Dallas v. *Langdeau*, 371 U.S. 444 (1963) 17
Myers v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977) 8, 9
Norman v. *McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971) 20
Oatis v. *Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968) 7
Oscar Mayer & Co. v. *Moody*, 99 S. Ct. 2066 (1979) 6
Seigal v. *Merrick*, 590 F.2d 35 (2d Cir. 1978) 20
Switzerland Cheese Association v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966) 9, 10
United Air Lines v. *Evans*, 431 U.S. 553 (1977) .. 3
United States v. *Alexandria*, 22 FEP Cases 872 (5th Cir. 1980) 8
United States v. *Armour & Co.*, 402 U.S. 673 (1971) 12
United Steelworkers v. *Weber*, 99 S. Ct. 2721 (1979) 6

Statutes:

28 U.S.C. § 1291 ..... *passim*
28 U.S.C. 1291(a)(1) ..... *passim*
Title VII of the Civil Rights Act of 1964, as amended:
42 U.S.C. §§ 2000e *et seq.* 2, 3
42 U.S.C. § 1981 ..... 2, 3
42 U.S.C. § 1291 ..... *passim*
42 U.S.C. § 1292(a)(1) ..... *passim*

Miscellaneous:

9 Moore's Federal Practice ¶ 110.19 (2d Ed.) 7
Note, 75 Harv. L. Rev. 351 (1961) 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, LAWRENCE HATCHER, STUART E. MINES,

Petitioners,

v.

AMERICAN BRANDS, INC., t/a THE AMERICAN TOBACCO COMPANY; LOCAL 182, TOBACCO WORKERS INTERNATIONAL; TOBACCO WORKERS INTERNATIONAL UNION,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for Fourth Circuit

---

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

---

[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§ 2000e *et seq.* and 42 U.S.C. § 1981). As such, EEAC's members have a direct interest in the issue presented for the Court's consideration; that is, whether the court of appeals erred in holding that the petitioners were not entitled, under 28 U.S.C. §§ 1291 and 1292(a)(1), to appeal the denial by the district court of a joint motion by the parties to approve and enter a proposed consent decree settling claims of employment discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981.[2]

---

[2] Because of its interest in issues involving the Court's interpretation of Title VII, EEAC has filed amicus curiae briefs in other equal employment cases. See e.g., *Gardner* v. *Westinghouse Broadcasting Company*, 437 U.S. 478 (1978); *Great*

STATEMENT OF THE CASE

Petitioners representing a class of black present and former employees and applicants for employment of a subsidiary of the respondent American Brands, Inc., brought this suit on October 24, 1975, alleging discrimination in hiring, promotion and transfer in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* After extensive discovery, the parties reached an agreement settling outstanding claims between them and jointly moved the district court to approve a proposed consent decree which would have ordered American Brands and the union to take affirmative action with respect to the hiring and promotion of black employees. Among other things, the company and the union would have been directed to set as a goal for one of its departments the filling of one-third of all supervisory positions with qualified blacks within a specified time period. The decree stated that the employer and union denied having engaged in discriminatory conduct and that the court found from the evidence previously filed that there were no discriminatory hiring practices at the facility in question. In a memorandum opinion and order, the district court refused to enter the proposed decree on the ground that it illegally granted racial preferences to black employees as there was no showing of past discrimination by the employer.

On September 14, 1979, the court of appeals sitting *en banc* dismissed for lack of jurisdiction the appeal of the district court's order. It held that the district

---

American Federal Savings & Loan Association v. *Novotny*, 99 S. Ct. 2345 (1979); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); and *United Air Lines* v. *Evans*, 431 U.S. 553 (1977).

court's order denying the injunctive relief was neither a final decision appealable under 28 U.S.C. § 1291 nor an order refusing an injunction under 28 U.S.C. § 1292(a)(1). Three of the seven judges dissented, concluding that the denial was appealable under the latter statute.

SUMMARY OF ARGUMENT

The district court's order denying entry of the consent decree satisfied the requirements of 28 U.S.C. §§ 1291 and 1292(a)(1), thereby giving the Fourth Circuit jurisdiction to consider whether the legal grounds relied upon by the trial court to reject the terms of the proposed settlement were valid. Section 1292(a)(1) provides appellate review as a matter of right for interlocutory orders refusing injunctions. Accordingly, whether the district court's order was appealable under Section 1292(a)(1) initially turns on whether the denial of the consent decree constituted the refusal of an injunction. Because the proposed decree contained directives mandating substantial changes in the defendants' hiring and promotion practices, that question must be answered in the affirmative.

Also, in a series of decisions this Court has delineated the scope of appellate jurisdiction authorized by Section 1292(a)(1). These opinions make clear that such jurisdiction will not be denied interlocutory orders of district courts which pass on the legal sufficiency of the appellant's claim for relief or for which effective review would be precluded if the appeal were delayed until the conclusion of the trial. Here, the district court clearly denied the requested relief on the ground that it could not lawfully be granted. Second, it is highly unlikely that a post-

trial ruling on a pre-trial settlement issue would provide meaningful review. After trial, the pretrial settlement issues would no longer be viable, as the question of liability would have been resolved at trial and the appropriate remedy would be directly related to the violation *found*, if any. Also, the parties would have little incentive at the end of a trial conclusively establishing liability to seek judicial permission to reenter an agreement reached through disclaimers of liability. As a result, the opportunity to resolve the issues *before* trial would have been lost and the policy of Title VII favoring voluntary compliance would have been undercut.

Appellate jurisdiction is also available as a matter of right under the collateral order doctrine recognized by this Court in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). That doctrine sets aside the finality requirement for interlocutory rulings of the kind from which the instant appeal was taken—i.e., those that conclusively determine a disputed question completely divorced from the merits of the action.

Finally, Congress has selected settlements to be the primary means of enforcing Title VII. Obviously, there is greater incentive to undertake serious settlement negotiations and to seek creative solutions to the issues posed if the parties can be reasonably certain that any question concerning the validity of settlement terms that they negotiate can be resolved quickly. If, however, district courts are to be given a *carte blanche* to circumscribe narrowly the legal grounds for settlement and effective review of such rulings is to be withheld until after trial, that result would have a debilitating effect on the process by which employment discrimination claims are settled.

ARGUMENT

THE ORDER REFUSING ENTRY OF THE CONSENT DECREE AS UNLAWFUL IS APPEALABLE AS A MATTER OF RIGHT UNDER 28 U.S.C. §§ 1291 AND 1292(a)(1)

A. The District Court's Refusal to Enter The Consent Decree Is Appealable Under 28 U.S.C. 1292(a)(1) As An Order Denying An Injunction

Although 28 U.S.C. § 1291 generally limits appellate review of district court orders to final decisions, exceptions are available for certain interlocutory orders which have final and irreparable effect on the rights of the parties. 28 U.S.C. § 1292; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). The question before the Court is whether the district court's order refusing entry of a consent decree resolving the employment discrimination claims alleged by the plaintiffs falls within any such exceptions.[3] As now discussed, the decision below is con-

---

[3] In answering this question, we urge the Court to consider the implications of its decision upon the enforcement of Title VII. The holding of the Fourth Circuit majority denying the right to appeal the district court's refusal to approve the parties' settlement undercuts Congress' decision that cooperation and voluntary compliance with the civil rights laws are "*the preferred* means for achieving [the elimination of unlawful employment discrimination]. . . ." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1975) (emphasis in the original). See also *United Steelworkers* v. *Weber*, 99 S. Ct. 2721, 2728 (1979); *Oscar Mayer & Co.* v. *Evans*, 99 S. Ct. 2066, 2071 (1979); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975). To comply with this Congressional mandate, "there is great emphasis in Title VII on private settlement and the elimination of unfair practices without

trary to the statutes governing appellate review and to the purposes of Title VII and other civil rights statutes.

Section 1292(a)(1) provides that:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, *refusing* or dissolving *injunctions*, or refusing to dissolve or modify injunctions . . . . (emphasis supplied).

Appealability, therefore, initially turns on whether the district court's refusal to enter the relief requested "was the refusal of an 'injunction' under § 1292." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 (1955).

An injunction has been defined as a judicial command that a party act in certain instances and/or not act in others, *Lewis* v. *Tobacco Workers' International Union*, 577 F.2d 1135, 1139 (4th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979), and an interlocutory order denying an injunction has been described as an order temporarily refusing to award part or all of the permanent injunctive relief sought by the claimant. 9 Moore's Federal Practice ¶ 110.19 (2d Ed.). It is indisputable, therefore, that the denial of the decree in this case was a denial of injunctive relief. Styled "Injunctive Relief for the Class," the proposed settlement would have directed changes in seniority and benefit systems, established hiring goals for qualified blacks in certain supervisory positions, granted job bidding preferences for sea-

---

litigation." *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) (emphasis added). See the discussion below (pp. 11-16).

sonal employees and prohibited discrimination against black employees. Indeed, even the court of appeals considered the relief requested to be injunctive. As the court stated, "Here, injunctive relief was not finally denied; it was merely not granted at this stage of the proceedings." *Carson* v. *American Brands, Inc.*, 606 F.2d 420, 423 (4th Cir. 1979).

Unlike the court below, other appellate courts have agreed on the correctness of reviewing interlocutory orders respecting injunctive relief which have been entered during the course of employment discrimination litigation. For example, in *United States* v. *Alexandria*, 22 FEP Cases 872 (5th Cir. 1980), the court, in reviewing the trial judge's refusal to enter a consent decree agreed to by the litigants, brushed off the jurisdictional challenge by relying on its earlier decision in *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 847 (5th Cir. 1977).[4] Applying the *Myers* rationale to the refusal of a consent decree, the Fifth Circuit concluded:

> Since an order granting approval of a consent decree is one 'granting' an injunction for purposes of § 1292(a)(1), an order refusing approval of a consent decree is necessarily one "refusing" an injunction for purposes of § 1292 (a)(1), and is therefore appealable. 22 FEP Cases at 874, n. 5.[5]

---

[4] In *Myers* the court asserted jurisdiction to review the approval of a settlement containing injunctive provisions effecting changes in a collective bargaining agreement.

[5] See also *EEOC* v. *International Longshoremen's Association*, 511 F.2d 276 (5th Cir. 1975), in which appellate jurisdiction was taken over the trial judge's denial of a request for a permanent injunction merging segregated longshoremen's unions.

Similarly, in *Lewis* v. *Tobacco Workers International Union*, 577 F.2d 1135, as in *Myers*, the Fourth Circuit took jurisdiction over an appeal of an interlocutory order adopting guidelines for injunctive relief proposed by the plaintiffs in a Title VII case on the basis that the order was the grant of an injunction under Section 1292(a)(1).

Also, this Court in a series of decisions has delineated the scope of appellate jurisdiction authorized by Section 1292(a)(1). These decisions make clear that jurisdiction is available as a matter of right under Section 1292(a)(1) if the order in question affects the merits or passes on the legal sufficiency of the appellant's claims for injunctive relief, or effective review would be precluded if the appeal were delayed until the conclusion of the trial. They also leave open the possibility of an appeal in cases where more than triable issues of fact are involved. Conversely, appellate jurisdiction is not granted to interlocutory orders which merely control procedural aspects of the litigation, may be effectively reviewed after the trial court has entered final judgment, or do not pass on the legal sufficiency of such a claim.

For example, in *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966), a Section 1292(a)(1) appeal was not permitted from the denial of a motion for summary judgment requesting a permanent injunction because the denial was "strictly a pretrial order that decides only one thing—that the case should go to trial." But the Court in *Switzerland Cheese* "left open the question whether an order denying summary judgment might be appealable as an order denying an injunction when the ground for the denial was other than the exist-

ence of a triable issue of fact." *Goldstein* v. *Cox*, 396 U.S. 471, 475 n. 2 (1970) (emphasis added).[6] Moreover, the Court in *Switzerland Cheese* found that the denial of summary judgment did not deny any relief, as the order did "not settle or even tentatively decide anything about the merits of the claim." 385 U.S. at 25. Similarly, in *Baltimore Contractors* a refusal to stay an action for an accounting pending arbitration was not seen as an interlocutory order denying injunctive relief, but was held to be merely "a step in controlling the litigation before the trial court . . . ." 348 U.S. at 185.[7] *Gardner* v. *Westinghouse Broadcasting Company*, 98 S. Ct. 2451 (1978), which represents this Court's most recent statement of the requisite elements of a 1292(a)(1) appeal, refused appellate jurisdiction over a challenge to a

---

[6] In *Goldstein* v. *Cox* (cited in preceding text), the Court narrowed its ruling in *Switzerland Cheese* to make clear that appeals from summary judgment denials would be prohibited only in cases in which the denial is based upon the existence of a triable issue of fact. The grounds for denial in the instant case do not concern the existence of a fact question. They deal with the legality of a consent decree mandating preferential treatment in the employment and promotion of blacks absent a finding of discrimination. See also *EEOC* v. *International Longshoremen's Association*, 511 F.2d 273 (5th Cir. 1975), at note 5, *supra*, which permitted appellate review of a denial of a permanent injunction because, *inter alia*, the appeal dealt with a matter of law.

[7] A grant of partial summary judgment in Title VII litigation was also considered nonappealable in *Liberty Mutual Insurance Company* v. *Wetzel*, 424 U.S. 737, 744-45 (1976), as the appeal was made before an actual injunction had been formulated. Because the order appealed in *Liberty Mutual* failed to either grant or deny injunctive relief, the Court did not rule on its appealability under Section 1292(a)(1).

pretrial order denying class certification in a Title VII case. The court noted that the order could be reviewed both prior to and after final judgment, and it neither affected the merits of the petitioner's claim nor passed on the legal sufficiency of any requests for injunctive relief.

Here, unlike *Gardner*, the trial court's decision denying pre-trial review of the order clearly turned upon the legal sufficiency of the proposed decree. The trial court cited with approval the statement in *Myers* v. *Gilman Paper Corp.*, 544 F.2d at 854, that "before a court can grant any relief it must find that the defendants engaged in the unlawful employment practices alleged in the complaint." 446 F. Supp. at 788. The court also found that the exculpatory clause as to the defendants' liability coupled with the plaintiff's admission that the employer's hiring practices were lawful "does not create any factual basis upon which relief may be granted." 445 F. Supp. at 789. It further found that the relief requested could not be granted because it would not apply or be limited to persons found to have been victims of racial discrimination. *Id.* Thus, the first requirement for appealability under *Gardner* is clearly satisfied here.

Moreover, delaying the appeal until the conclusion of the trial would preclude any meaningful review of the district court's ruling. The effect of the interlocutory order was to force the parties to go forward with an expensive, time-consuming trial. The court's memorandum plainly demonstrates that a settlement will not be accepted until it is established that the employer and union have committed unlawful employment discrimination. Because the denial negated

the opportunity to resolve this case *without* trial, it was not an order that could reasonably "be reviewed by prior to and after final judgment." *Gardner, supra*, 98 S. Ct. at 2453.

Denying review of such orders until after trial would ignore the fact that settlements are compromises. Here, each side agreed to sacrifice potential legal claims and defenses in order to resolve their dispute.[8] Also, the employer and union, in exchange for a clear statement as to freedom from liability, agreed to make substantial changes in hiring and promotion practices.[9]

---

[8] This Court stated in *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

[9] As the dissent stated below:

> Disclaimers of liability and disclaimers of admissions of legality are not uncommon in settlement agreements, as well as in consent decrees. A ruling that litigation may not be settled unless a party formally admits liability, or formally concedes legality, or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements *since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights.* 20 FEP Cases at 1195. (Emphasis supplied).

Once the question of liability has been decided in a judicial proceeding, however, it is highly unlikely that the parties or district court would be willing to return to the terms of the original consent decree. After a trial, any remedy must be tailored to fit the violations (if any) found by the trial court. *Cf.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 417 (1977). No party who stands to gain more from a trial decree than the settlement would be willing to accept the originally proposed terms. Moreover, it is doubtful that a district court has the authority after trial to approve a settlement not closely related to the precise violations found. *Brinkman, supra.*

It is difficult, therefore, to conceive how a post-trial ruling by the appellate court on the propriety of the district court's refusal to accept the pre-trial settlement agreement would be a meaningful review of the district court's action. Although the court of appeals below may have been technically correct in saying that the merits of the decree can be reviewed following final judgment, 606 F.2d at 424, such a right of review would be an empty right. Treating the order as unreviewable until the conclusion of the trial means, as a practical matter, that the parties have lost irreparably their right to settle the discrimination claims in a manner negating the need for a trial. Such a loss hardly fulfills the objective of Title VII, which is to encourage, not discourage, settlements.[10]

---

[10] Recognition that settlement avoids costly and protracted litigation undoubtedly was a strong reason for Congress' emphasis upon conciliation and voluntary compliance as the primary means of enforcing Title VII. Although permitting

A prohibition against appellate review of orders denying pretrial settlements would also have a debilitating effect on the process by which employment discrimination claims are settled. Obviously, there is greater incentive to undertake serious and often protracted settlement negotiations and to seek creative solutions to the issues posed if the parties can be reasonably certain that any question concerning the validity of settlement terms that they negotiate can be resolved quickly. If, however, district courts are to be given a *carte blanche* to circumscribe narrowly the legal grounds for relief, and effective review of such rulings cannot be obtained until after trial, then:

> [p]arties would be hesitant to explore the likelihood of settlement apprehensive as they would be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise. *Florida Trailer and Equipment Co.* v. *Deal*, 284 F.2d 507, 571 (5th Cir. 1960).

Many of EEAC's members have entered into consent decrees in order to avoid lengthy trials and

---

appeals from denials of proposed settlements would increase appellate litigation to some extent, in the aggregate, litigation would be lessened by obviating the need for a lengthy trial and later appellate review of *both* the substantive and remedial aspects of the district court's findings *plus* the validity of the proposed decree. Permitting appeals of such orders, therefore, is consistent with this Court's concern for the effect on the courts' dockets of permitting interlocutory appeals. See *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176, 181-82 (1955); and *Coopers & Lybrand* v. *Livesay*, 98 S. Ct. 2454, 2463 (1977).

protracted litigation. Pursuant to these decrees, thousands of alleged discriminatees have received compensation and other remedies much more quickly than if they had been required to await the end of a lengthy trial and then an appeal of both an earlier denial of a proposed settlement and the trial proceedings. The importance of settlement to the enforcement of Title VII rights was described vividly by Judge Higginbotham in his opinion in *Commonwealth of Pennsylvania* v. *Local Union 542, Int'l Union of Operating Engineers*, No. 71-2698 (E.D. Pa.), order dated November 7, 1979, No. 223, Daily Labor Report, November 16, 1979, pp. D-1 through D-2:

> Tragically, the parties were once again unable to settle the case even though I made specific recommendations on dollar amounts and injunctive relief. One side was willing to accept my recommendation but the other side made, in my view, such an unrealistic demand that the class plaintiffs' cupboard will again be barren—except for the gratification that their counsel will be arguing refined, sophisticated legal doctrines about damages which they hope to collect years from now.
>
> * * *
>
> [A]t the damage phase, all counsel must come to grips with the reality that it is often easier to litigate acrimoniously and protractedly than it is to use creative efforts in attempts to constructively terminate litigation. In the final analysis, the brilliant briefs of counsel, the flash of eloquent arguments, the citations in the future to their case as significant precedent, and even the drama of a packed courtroom will never be

adequate mementos for the victims of discrimination who desire money and jobs *now*. Similarly, protracted litigation does not aid the defendants who at this stage must recognize that it is far better to conclude litigation with liability and responsibilities being defined now, than to wallow endlessly in a quagmire of unresolved disputes—as lawyers are kept busy litigating, and operating engineers and their employers are kept confused by the unending process.

The decision below would disrupt the settlement process, increase litigation in complex cases and prolong final determinations of the rights and obligations of all parties in a manner that is directly contrary to the intent of Congress and the purposes of Title VII.

B. The Order Refusing Entry Of The Consent Decree Is Appealable As A Collateral Order Under 28 U.S.C. § 1291.

28 U.S.C. § 1291 [11] provides for appeal "from all final decisions of the district courts," except when direct appeal may be brought to this Court. Appellate courts have been cautioned, however, not to apply the finality requirement of the statute rigidly, but to give it a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 172 (1974). Accordingly, a decision ap-

[11] The section provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the Disrict Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

pealable under Section 1291 falls into one of two categories. Either it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment . . .," *Catlin* v. *United States*, 324 U.S. 229, 233 (1945), or it is final as to some collateral matter.[12] *Cohen, supra*, 337 U.S. 541, 546. Appealable collateral orders were described in *Cohen* as those which:

> finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. 337 U.S. at 546.

For these reasons, the *Cohen* court held that an order in a shareholder's derivative suit which refused to require the plaintiff to post security for costs as required by state law was directly appealable as a matter collateral to the plaintiff's cause of action. Because it was questionable whether the plaintiffs had the financial resources to post security, appellate review would be determinative as to whether the case could go forward at all. Obviously, if this question had not been reviewed until after the trial, effective review would have been denied. As one commentator has pointed out:

> There are frequent situations in which prompt review is urgent. Reversal of some interlocutory orders will terminate litigation . . ., thereby

---

[12] An order is collateral if it "is a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Mercantile National Bank at Dallas* v. *Langdeau*, 371 U.S. 444, 558 (1963).

> eliminating needless proceedings in the lower court. Note, 75 Harv. L. Rev. 351, 352 (1961).

Accordingly, this Court has permitted appellate jurisdiction to be taken over interlocutory orders that are "fundamental to the further conduct of the case." *Gillespie* v. *United States Steel Corporation*, 379 U.S. 148, 153 (1964), quoting *Land* v. *Dollar*, 330 U.S. 731, 734, n.2 (1947). A Jones Act case, *Gillespie* dealt with a district court order striking both portions of the complaint adding claims under state law and all references to recovery for the benefit of relatives of the decedent other than his mother. When the court refused to certify its order for interlocutory appeal under 28 U.S.C. 1292(b), the plaintiff sought and was given appellate review as a matter of right.

> We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. 379 U.S. at 153.

An interlocutory order was also held appealable in *Eisen* v. *Carlisle & Jacquelin*, *supra*, 417 U.S. 156, which involved a class action brought by odd-lot traders against a stock exchange alleging violation of antitrust and securities laws. At issue was whether

the court of appeals "had jurisdiction to review the District Court's orders permitting the suit to proceed as a class action and allocating the cost of notice." *Id.* at 169. Finding the case to be controlled by *Cohen*, the question was answered in the affirmative as the district court's ruling was found to have conclusively rejected claims that involved a collateral matter unrelated to the merits:

> In our view the Court of Appeals . . . had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23(c)(2) in a way that would permit petitioner's suit to proceed as a class action. *Id.* at 172 (footnotes omitted).[13]

The test for determining whether an order comes within the collateral order doctrine was recently restated in *Coopers & Lybrand* v. *Livesay*, 98 S. Ct. 2454 (1978): the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. The *Livesay* court concluded that an order passing on a request for class certification did not fall within the definition of appealable collateral orders. According to the opinion, because the class

---

[13] Two years later, appellate review was denied a ruling on the plaintiff's motion for a partial summary judgment as to the defendant's liability in a sex discrimination case. *Liberty Mutual Insurance Company* v. *Wetzel*, 424 U.S. 737, 744 (1976). Because the plaintiff's initial claims for relief had been left unresolved, the requisite element of finality was found to be missing.

determination involved considerations enmeshed in the factual and legal issues comprising the plaintiff's cause of action, the order was subject to revision by the district court and effective review would be available after final judgment. 98 S. Ct. at 2458.

Norman v. *McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), applied the criteria developed in *Cohen* and its progeny to a determination of whether the disapproval of a proposed settlement is an appealable collateral order. In that case the Court of Appeals for the Ninth Circuit was asked to assert jurisdiction over a trial court order refusing to accept a proposed settlement of a class action charging the directors, officers and managers of a securities fund with violations of the Investment Company Act. Granting jurisdiction, the court concluded that:

> the order disapproving the proposed settlement is a collateral order. The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and it is not in any sense an ingredient of the cause of action. In itself, the district judge's order is final on the question of whether the proposed settlement should be given judicial approval. 431 F.2d at 773.[14]

---

[14] A different result was reached in *Seigal* v. *Merrick*, 590 F.2d 35 (2d Cir. 1978), which held that the disapproval of a settlement in a stockholder's derivative suit was not appealable as a collateral order under Section 1291. While viewing such a denial as the equivalent of a denial of a summary judgment or the grant of a new trial which have been held nonappealable, the court did acknowledge that the refusal was final in the sense that "that *particular* settlement will never be revived." *Id.* at 38 (emphasis in original).

Applying the above criteria to the instant case, it is clear that jurisdiction should have been granted below. First, the order conclusively determined a disputed question that was competely separate from the merits of the action, i.e., the legal validity of a proposed settlement apart and separate from a trial determination of the merits of plaintiffs' claims. Second, the suit alleged violations of statutes and constitutional prohibitions forbidding employment discrimination. In contrast, the order from which the appeal is sought dealt with the question of whether a district court may grant injunctive relief containing specific employment quotas based on race without a conclusive determination having been made as to the employer's liability. The question on appeal is not one that is likely to arise during the course of a trial on the plaintiff's claims. Finally, the order is effectively unreviewable on appeal from a final judgment. As discussed above, the parties would have little, if any, incentive at the conclusion of a trial in which liability was established to seek judicial permission to reenter an agreement reached through disclaimers of liability.[15]

---

[15] See, pp. 11-14, *supra*.

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the decision of the Court of Appeals for the Fourth Circuit refusing to assert appellate jurisdiction under 28 U.S.C. § 1291 and 1292(a)(1) over a challenge to the district court's order refusing entry of the consent decree should be reversed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
JEFFREY C. MCGUINESS
MCGUINESS & WILLIAMS
1015 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

September 2, 1980

Supreme Court, U. S.
FILED
AUG 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1236

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK L. CARSON, ET AL., PETITIONERS

v.

AMERICAN BRANDS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARLON L. DALTON
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1236

FRANK L. CARSON, ET AL., PETITIONERS*

v.

AMERICAN BRANDS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether a district court's order refusing to enter a tendered consent decree providing for injunctive relief in a Title VII case is appealable as either an order refusing an injunction under 28 U.S.C. 1292(a)(1) or a final decision under 28 U.S.C. 1291.

---

*Frank L. Carson, Lawrence Hatcher, and Stuart E. Mines were plaintiffs-appellants below and are petitioners herein. American Brands, Inc. (T/A The American Tobacco Company), Local 182 of the Tobacco Workers International Union, and the Tobacco Workers International Union were defendants-appellees and are respondents herein.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	5
Argument	8
I. The district court's order is appealable as an order refusing an injunction under 28 U.S.C. 1292 (a)(1)	8
A. The order falls within the language of Section 1292(a)(1) and is of the type the statute is intended to reach	9
B. Appealability is particularly appropriate here in light of an important congressional policy embodied in Title VII	14
II. The district court's order is appealable as a "collateral order" under 28 U.S.C. 1291	16
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651	11
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36	14
Baltimore Contractors, Inc., v. *Bodinger*, 348 U.S. 176	6, 8, 10
Bryan v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799, cert. denied, 419 U.S. 900	17
City of Detroit v. *Grinnell Corp.*, 495 F.2d 448	17
Coopers & Lybrand v. *Livesay*, 437 U.S. 463	7, 8, 16
Cotton v. *Hinton*, 559 F.2d 1326	17
Emporium Capwell Co. v. *Western Addition Community Organization*, 420 U.S. 50	14

Cases—Continued: Page

Flinn v. *FMC Corp.*, 528 F.2d 1169, cert. denied, 424 U.S. 967 17
Forgay v. *Conrad*, 47 U.S. (6 How.) 201 8
Gardner v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 ..... 4, 5, 12, 13
Grunin v. *International House of Pancakes*, 513 F.2d 114, cert. denied, 423 U.S. 864 17
Mandujano v. *Basic Vegetable Products, Inc.*, 541 F.2d 832 17
Norman v. *McKee*, 431 F.2d 769, cert. denied, 401 U.S. 912 17
Patterson v. *Stovall*, 528 F.2d 108 17
Switzerland Cheese Ass'n v. *E. Horne's Market, Inc.*, 385 U.S. 23 ..... 4, 5, 11
United States v. *Armour & Co.*, 402 U.S. 673 10
United States v. *City of Alexandria*, 614 F.2d 1358 ..... 8, 9, 16
United States v. *City of Jackson, Mississippi*, 519 F.2d 1147 15
United Steelworkers of America, AFL-CIO-CLC v. *Weber*, 443 U.S. 193 16

Statutes and rule:

Civil Rights Act of 1964, Title VII, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. (& Supp. II) 2000e *et seq.*:
42 U.S.C. 2000e *et seq.*: 1
42 U.S.C. 2000e-5 15
42 U.S.C. 2000e-5(b) 14
42 U.S.C. 2000e-5(f) 14
42 U.S.C. 2000e-5(f)(1) 1
42 U.S.C. 2000e-6 15
42 U.S.C. (& Supp. II) 2000e-6 ..... 1, 14
28 U.S.C. 1254(3) 13
28 U.S.C. 1291 ..... 4, 7, 11, 16

Statutes—Continued: Page

28 U.S.C. 1292(a) 8
28 U.S.C. 1292(a)(1) ..... *passim*
28 U.S.C. 1292(b) 13
42 U.S.C. 1981 1
Fed. R. Civ. P. 23(e) 2

Miscellaneous:

3A A. Corbin, *Contracts* (1960) 18

INTEREST OF THE UNITED STATES

In response to this Court's invitation of April 14, 1980, the United States filed a brief suggesting that the petition for a writ of certiorari should be granted both because a conflict exists among the circuits concerning the question presented and because the decision of the court of appeals "frustrates an important congressional policy embodied in Title VII of the Civil Rights Act of 1964" (May 1980 Brief for the United States As Amicus Curiae 6). The petition having been granted, we file this brief in support of petitioners' contention that the judgment below should be reversed.

Federal enforcement of Title VII has been vested by Congress in the Equal Employment Opportunity Commission and the Department of Justice. The Equal Employment Opportunity Commission has authority to bring civil actions against private employers under 42 U.S.C. 2000e-5(f)(1). The Attorney General has enforcement responsibility when the employer is a state government, governmental agency, or political subdivision. 42 U.S.C. (& Supp. II) 2000e-6.

STATEMENT

1. Petitioners, representing a class of black present and former seasonal employees and applicants for employment at the Richmond Leaf Department of the American Tobacco Company, commenced this action on October 24, 1975. The complaint alleged that respondents had violated Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, and 42 U.S.C. 1981 by discriminating against black employees and applicants in, *inter alia*, hiring, promotion, transfer and on-the-job training opportunities, thereby restricting petitioners to lower paying, less desirable jobs traditionally reserved for black employees (A. 4).[1]

[1] "A." refers to the Appendix filed in the court of appeals.

After engaging in extensive discovery, the parties reached an agreement settling petitioners' claims. They then prepared a consent decree, signed it, and submitted it to the district court on April 1, 1977 for approval pursuant to Fed. R. Civ. P. 23(e). On June 2, 1977, the district court issued a memorandum opinion and order (Pet. App. 28a–51a) refusing to enter the proposed decree on the ground that it illegally granted racial preferences to black employees.

On September 14, 1979, the court of appeals, sitting en banc, dismissed petitioners' appeal for lack of jurisdiction, Chief Judge Haynsworth and Circuit Judges Winter and Butzner dissenting (Pet. App. 1a–27a).

2. The district court accepted as true for the purpose of considering the proposed settlement the following facts recited by petitioners in their brief in support of entry of the decree.

Respondent American Brands, Inc. operates the Richmond Leaf Department of the American Tobacco Company where it processes and stores leaf tobacco (Pet. App. 29a). Respondent Local 182, a member of respondent Tobacco Workers International Union, is the exclusive bargaining agent for all hourly paid production unit employees of the Richmond Leaf Department (*ibid.*).

Two categories of persons are employed in the Richmond Leaf Department—regular employees who work year-round and seasonal employees who work an average of six months a year (Pet. App. 29a–30a). Prior to September 1963, certain of the regular job classifications, including that of watchman, were reserved for whites only (*id.* at 30a). At the time the consent decree was presented to the district court, the company employed approximately 150 seasonal employees, all of whom are black, and approximately 100 regular employees, 66% of whom are black. To petitioners' knowledge no white person has ever been employed on a seasonal basis in the Richmond Leaf Department (*ibid.*).

Separate seniority rosters are maintained for regular and seasonal employees. A seasonal employee may trans-

fer to a regular position only if no regular employee is interested in the vacant position, and in so doing loses all accumulated seniority (Pet. App. 30a). The loss of seniority affects the employee's status for promotions, demotions, layoffs, recalls and vacations (*id.* at 31a).

While blacks constitute 84% of the company's production unit employees,[2] they hold only 20% of the supervisory positions (Pet. App. 31a). As of February 15, 1976, only one of the 16 persons employed in the position of watchman, a job formerly reserved for whites, was black (*id.* at 30a).

The consent decree negotiated by the parties proposed that the company's seniority and transfer policies be modified to allow seasonal workers to maintain seniority upon transfer to regular positions,[3] and to require that before outside hiring is attempted seasonal employees be given the opportunity to fill vacancies not filled by regular employees for all hourly paid permanent production jobs and for the job of watchman (Pet. App. 32a–33a). The decree also eliminated the requirement that seasonal employees serve a probationary period after transferring to regular positions (*id.* at 33a). In addition, the decree set a goal for the filling of production supervisory positions with qualified blacks so that one-third of such positions would be held by blacks by December 31, 1980 (*ibid.*).

Finally, the proposed decree contained an injunction prohibiting respondents from discriminating against black employees of the Richmond Leaf Department and a three-year reporting requirement so that compliance with its provisions could be monitored (Pet. 14; A. 51, 55).[4]

---

[2]Since 1971, more than 90% of new hires at the Richmond Leaf Department have been black (Pet. App. 31a).

[3]The agreement also provided that employees already in regular positions would be credited with any time worked as seasonal employees, to be calculated according to the terms of the collective bargaining agreement (Pet. App. 32a).

[4]The proposed decree included a specific finding that the company was not engaged in any discriminatory *hiring* practices at the Richmond Leaf Department. Accordingly, it provided no relief for black applicants for employment (Pet. App. 32a).

3. The district court refused to approve the settlement, reasoning that in view of respondents' express denial of discrimination against the plaintiff class, the foregoing provisions of the decree (which benefitted only seasonal employees all of whom are black) constituted preferential treatment based on race and were thus violative of Title VII and the Constitution (Pet. App. 32a, 45a-48a). The court also determined that even if the parties had presented evidence of present discrimination or the present effects of past discrimination, the relief envisioned by the decree would be inappropriate because it was not limited to the actual victims of such discrimination (Pet. App. 39a-42a, 46a).

The court concluded by stating (Pet. App. 50a):

> When the parties have settled their differences without a violation of the law and without violating the right of any class members, the Court will enter an appropriate order without prejudice to the right of any person to seek redress for racial discrimination. But this Court will not, by entering the proposed Consent Decree provide the parties with a judicial license to practice racial discrimination.

4. After full briefing and argument, the court of appeals dismissed petitioners' appeal, holding that the district court's order refusing to approve and enter the consent decree was neither a final decision appealable under 28 U.S.C. 1291 nor an order refusing an injunction under 28 U.S.C. 1292(a)(1). It analogized the order to the denial of a motion for summary judgment in a case where a contrary decision would have resulted in entry of an injunction, and to the denial of class certification where the complaint seeks broad injunctive relief. Noting that in both such circumstances this Court has held that no appeal would lie (*Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966); *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)), the court of appeals saw no reason to reach a different result here (Pet. App. 5a-6a).

In addition to concluding that the district's court's order did not irreparably harm petitioners because they retained

the right to proceed to trial on their claim for injunctive relief and thereafter to seek appellate review of the refusal to enter the decree (Pet. App. 10a), the court of appeals observed that the parties were free to propose alternative decrees which the district court might approve (*ibid.*). Underlying the court's analysis was its view that district courts should maintain full control over the course of litigation through the entry of final judgment, and in so doing should guide the parties' efforts to compromise their claims (Pet. App. 7a–9a).

Three of the seven judges dissented, concluding in an opinion by Judge Winter that the order refusing to approve the consent decree is appealable under 28 U.S.C. 1292(a)(1) (Pet. App. 18a). The dissenting judges distinguished the district court's order from the refusal to certify a class in *Gardner*, *supra*, and from the denial of summary judgment in *Switzerland Cheese*, *supra*, reasoning that here the district court conclusively determined important issues that cannot effectively be reviewed following final judgment (Pet. App. 21a).[5]

SUMMARY OF ARGUMENT

The district court's order in this Title VII case refusing to approve a jointly proposed consent decree is appealable under 28 U.S.C. 1292(a)(1) as an order refusing an injunction. First, the order falls within the literal terms of the statute. The consent decree, if entered, would have compelled respondents to make specified changes in American Tobacco Company's employment practices and to refrain from discriminating in the future. In a word, the consent decree constituted an injunction. Had it been entered, the order doing so would have been appealable under Section 1292(a)(1). The district court's order refusing to enter the

[5] Reaching the merits, the dissenting judges concluded that the district court abused its discretion in refusing to approve the decree (Pet. App. 22a–26a). They would have modified the decree, however, to give notice and an opportunity to object to the subclass of applicants for whom no relief was provided in the settlement. See note 4, *supra*.

consent decree is likewise appealable under Section 1292(a)(1).

Second, the district court's order is one of "serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.*, v. *Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted). Many of the benefits that flow from the parties' agreement to settle their differences by consent decree will be lost if the case has to be tried. The factors that motivate parties to enter into settlement agreements—savings of time and expense and the reduction of risk—evaporate once a case goes to trial. In addition, defendants lose the opportunity to influence both the form and the terms of the relief awarded plaintiffs. Defendants also lose the opportunity to protect their good name from a judicial determination that they have violated the law. And unrecoverable judicial resources are expended.

The district court's order here is particularly one of "serious, perhaps irreparable, consequence" in view of Title VII's statutorily expressed preference for voluntary resolution of charges of discrimination. Once a dispute has reached the litigation stage this policy can best be implemented by encouraging judgments on consent. Indeed, the consent decree has proven to be the dominant means by which the government resolves Title VII disputes.

Third, the district court's order cannot adequately be reviewed following a litigated final judgment. The parties' perceptions at the time of settlement, their assessment of the strengths and weaknesses of their case and the case against them, and the value they place on avoiding a trial cannot be recaptured once intervening events, including the trial they sought to avoid, have altered their perspective and the court's. Moreover, to the extent that a party fares better under a litigated judgment than under an improperly rejected consent decree, its willingness to challenge that rejection will likely fade. While the party disappointed after trial can be expected to appeal the refusal to enter the proposed consent decree, it may well be placed in the untenable position of trying to convince the

court of appeals to enforce a settlement providing relief not fully consistent with the facts actually adduced at trial.

Finally, prompt review would further the policies underlying the finality rule. Immediate appellate review of refusals to enter consent decrees would advance rather than hinder the course of litigation by eliminating unnecessary trials and the delay and expense that attend them. While appeals could conceivably be taken for dilatory purposes, the reasons underlying parties' willingness to enter into settlement agreements and the dynamics that take over once an initial settlement has been hammered out strongly suggest that rarely would an appeal be taken other than in good faith following a substantial effort to find an alternative common ground.

The district court's order is also appealable as a collateral order under 28 U.S.C. 1291. It "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). For the reasons outlined above, the first and third prongs of this test have been satisfied. As for the second, although in evaluating a proposed settlement a district court must take a peek at the merits, the issue of whether the settlement should be approved is quite distinct from the post-trial issue of who is to prevail. A court may not reject a settlement merely because on the same facts it would, after trial, impose obligations and distribute benefits differently than did the parties, or because it doubts that at trial the parties could prove the facts on which they agree for purposes of settlement. Rather, the court's role is to assure that the settlement is fair, adequate, reasonable and noncollusive. Thus, the merits of the district court's refusal to enter the proposed consent decree in the instant case presents an issue separate from, and collateral to, the merits of the claims the parties seek to compromise.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS APPEALABLE AS AN ORDER REFUSING AN INJUNCTION UNDER 28 U.S.C. 1292(a)(1)

For as long as it has sat, Congress has generally limited appellate review to final decrees and judgments, eschewing piecemeal appeals and the delays they engender. *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201, 205 (1848). However, Congress has also recognized, as has this Court, that the interests of justice are furthered by allowing appeals from nonfinal decisions in certain circumstances.

Thus, 28 U.S.C. 1292(a) provides that "[t]he courts of appeals shall have jurisdiction of appeals from: (1) [i]nterlocutory orders * * * granting, continuing, modifying, refusing or dissolving injunctions, * * * except where direct review may be had in the Supreme Court." This legislative exception to the finality rule "spring[s] from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.*, v. *Bodinger*, 348 U.S. 176, 181 (1955) (footnote omitted).

The courts of appeals are in conflict concerning whether a district court order refusing to enter a proposed consent decree is among those for which Congress intended to authorize immediate appeal. The court below concluded that it is not. In contrast, the Fifth Circuit concluded in *United States* v. *City of Alexandria*, 614 F.2d 1358 (1980), that such an order in a Title VII action falls within the literal terms of, and is appealable under, 28 U.S.C. 1292(a)(1).[6]

---

[6]The Fifth Circuit reached this result based upon its own prior decision that an order *approving* a settlement providing for injunctive relief was an order "granting" an injunction within the meaning of Section 1292(a)(1). It followed, in the court's view, that an order refusing approval of such a settlement is an order "refusing" an injunction. 614 F.2d at 1361 n.5. Although the court sought to distinguish the instant case as relating to a class action (*ibid.*), "[t]he appealability of any order entered in a class action is determined by the same standards that govern appealability in other types of litigation." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 470 (1978).

In our view, the result reached by the Fifth Circuit is the correct one.

A. The Order Falls Within The Language Of Section 1292(a)(1) And Is Of The Type The Statute Is Intended To Reach

At the outset we stress, as did the Fifth Circuit in *United States* v. *City of Alexandria*, *supra*, that the order appealed from falls within the literal terms of Section 1292(a)(1). Had the district court signed the proposed consent decree, respondents would have been compelled to make specified changes in American Tobacco Company's seniority, transfer and promotion practices, to work toward a specified goal for placing qualified blacks in production supervisory positions, and to refrain from thereinafter discriminating against black employees. Quite evidently, then, had the consent decree been entered, it would have constituted an order "granting" an injunction within the meaning of Section 1292(a)(1). By a parity of reasoning the district court's order rejecting the decree constitutes an order "refusing" an injunction.

While it is true, as the court below observed, that insofar as they remain free to go to trial petitioners have not altogether lost "their claims for final injunctive relief" (Pet. App. 10a), that fact does not strip the proposed consent decree of its injunctive character nor place the order refusing to enter the decree outside the reach of Section 1292(a)(1). First, an order refusing to enter a consent decree denies the parties to it "final injunctive relief" on the terms perceived by them to be most mutually advantageous. See pages 10–11, *infra*. Second, even if injunctive relief is eventually granted, a refusal to enter a consent decree deprives the parties of that relief while the case wends its way toward final judgment. In that sense, an order refusing to enter a consent decree containing injunctive provisions is akin to an order refusing a preliminary injunction, and is appealable to the same extent.

As noted above, Section 1292(a)(1) was enacted so that review could be had of "interlocutory orders of serious,

perhaps irreparable, consequence." *Baltimore Contractors, Inc.*, v. *Bodinger, supra*, 348 U.S. at 181 (footnote omitted). The order petitioners seek to appeal fits squarely within that category inasmuch as it effectively denies petitioners and respondents alike the opportunity to settle their dispute voluntarily, and to enjoy the benefits of having done so.[7]

A consent decree and a judgment following trial are not fungible. Both, of course, confer rights and impose duties on the parties they cover. However, a consent decree by its nature produces benefits that are eroded when a case goes to trial. One of the primary reasons litigants enter into voluntary settlements is to avoid the expense, delay and risk associated with litigation. As this Court explained in *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971):

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each gave up something they might have won had they proceeded with the litigation.

A second advantage of negotiated settlements is that they afford defendants an opportunity to influence the form as well as the terms of the relief granted plaintiffs. In Title VII proceedings this means that employers may seek to structure remedies compatible with their business

---

[7] The court of appeals stressed (Pet. App. 8a) that the district court remained free to reconsider its refusal to enter the proposed decree, and that the parties remained free to submit alternative proposals more likely to find favor with the court. However, it is manifest that nothing short of an admission of discrimination by the respondents would persuade the district court in this case to approve any relief proposed by the parties, and that the specific class relief contained in the proposed decree will not be approved unless the parties demonstrate that every class member was an actual victim of discrimination. See page 4, *supra*.

interests. Another characteristic of negotiated settlements is that defendants are able to protect their good will by avoiding a judicial determination that they have discriminated.[8] Finally, settlements free judicial resources for use in other cases. These benefits are irretrievably lost once litigants proceed to trial. Even if a refusal to enter a consent decree could be overturned on appeal from a fully litigated judgment, great harm already would have been done. Cf. *Abney* v. *United States*, 431 U.S. 651, 660–662 (1977) (pretrial order rejecting claim of former jeopardy appealable under 28 U.S.C. 1291 since even if subsequent conviction reversed on appeal, defendant forced to endure trial that Double Jeopardy Clause designed to prohibit). Thus, the district court's order refusing to enter the consent decree was both serious and, most likely, irreparable.

In this most important of respects, a refusal to enter an injunction by consent differs markedly from a simple denial of summary judgment, the appealability of which this Court considered in *Switzerland Cheese Ass'n* v. *E. Horne's Market, Inc.*, *supra*. The sole unrecoverable loss when a summary judgment motion is erroneously denied on the ground that genuine issues of material fact exist is the time and expense expended by the parties and the court in proceeding to trial. However, only the disputed facts need be tried, and to the extent the dispute proves to be illusory (*i.e.*, to the extent the trial court erred in not disposing of the case by way of summary judgment), the trial will likely be *pro forma*. Thus, little of consequence turns on the denial of a motion for summary judgment.

Not only are the benefits of settlement irretrievable once a case goes to trial. The propriety of the court's re-

---

[8] To accomplish this, defendants customarily insert in consent decrees or the settlement agreements underlying them a disclaimer of liability. As the court of appeals judges who dissented in the instant case observed (Pet. App. 25a), "[a] ruling [like the one made by the district court] that litigation may not be settled unless a party formally admits liability * * * or a court determines liability or a lack thereof, would defeat the general policy of the law to foster settlements since the very purpose of a settlement is usually to avoid an adjudication or a concession of rights."

fusal to endorse a settlement cannot as appropriately be reviewed after a litigated final judgment (or a judgment based on an alternative agreement) is entered. A settlement agreement reflects the parties' best assessment at a given point of the strengths and weaknesses of their respective cases, and of the advantages and disadvantages of, and risks and uncertainties inherent in, proceeding to trial. That state of facts, of mind, and of perspective cannot faithfully be reconstructed once intervening events have altered the parties' (and the court's) view of the case. The dissenting judges below correctly perceived (Pet. App. 20a–21a) that once a case is tried, "as a practical matter the propriety of the proposed settlement will not be raised again either in the district court or" on appeal.

Should, however, the settlement issue surface after final judgment, the appellant would be a losing plaintiff who would have been granted relief under the disapproved consent decree, or an unsuccessful defendant whose obligations would have been fewer under the decree. In either circumstance, where the refusal to enter the decree was improper but the trial court's findings of fact vary sufficiently from the facts as they appeared at the time the decree was disapproved to justify different relief, the court of appeals is placed in a rather difficult position. It can enforce the settlement even though subsequently developed facts prove its terms to be not fully justified, or it can enforce the litigated judgment even though to do so would deprive the parties of the benefits and risks of a bargain freely entered into and wrongly rejected by the trial court. Both approaches contain elements of unfairness to the parties. Permitting an immediate appeal from refusals to enter consent decrees would spare appellate courts the need to choose either alternative.

Because of the injunctive provisions of the proposed consent decree and the difficulties inherent in reviewing the district court's order once a litigated final judgment is entered, this case has little in common with *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, in which the Court held (437 U.S. at 480) that a denial of class certifica-

tion was not appealable under Section 1292(a)(1), primarily because "[i]t could be reviewed both prior to and after final judgment * * *." *Gardner* is further inapposite because the order involved in that case "did not pass on the legal sufficiency of any claims for injunctive relief" (437 U.S. at 481; footnote omitted), whereas the order in the instant case was premised on the belief that the injunctive relief sought by the parties has no legal basis and is itself unlawful.

Finally, an appeal should be permitted here not only because the district court's order comes within the language of Section 1292(a)(1) and is of serious, perhaps irreparable consequence, but also because prompt review would not lead to the evils the finality rule was designed to combat. Specifically, the availability of immediate appellate review from refusals to enter consent decrees would advance rather than disrupt the course of litigation and would not, as the court below feared (Pet. App. 8a–10a), involve the courts of appeals in a rash of appeals. The fact that an order is appealable does not, of course, mean that immediate review will in fact be sought. As a practical matter, if following the rejection of a proposed consent decree the parties believe they can reach an alternative agreement satisfactory to themselves and to the court, it is unlikely that they would undertake the expense and suffer the delay of an appeal without first exploring seriously such alternatives. At the same time, the possibility that its order might be appealed would serve as a check on precipitous or unwarranted action by the district court. Thus, an appeal is likely only where even after a sober second look the parties and the court are unable to find a common ground.[9] Given the parties' typical commitment to a voluntary resolution once an initial settlement has been hammered out (see note 13, *infra*) and the court's interest in resolving disputes expeditiously, the spectre raised by the

[9] An irreconcilable impasse is most probable where, as here, the court's refusal to enter the decree is based on its reading (or misreading) of the applicable law. In such circumstances, a prompt appeal is particularly appropriate. Cf. 28 U.S.C. 1292(b); 28 U.S.C. 1254(3).

court below (Pet. App. 9a) of "an endless string of appeals" does not loom very large.

B. Appealability Is Particularly Appropriate Here In Light Of An Important Congressional Policy Embodied In Title VII

As this Court recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted):

> Congress enacted Title VII * * * to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.

To that end, Title VII is structured so that a person claiming to be aggrieved by an unlawful employment practice must file a charge with the Equal Employment Opportunity Commission prior to instituting a civil action in the district court. 42 U.S.C. 2000e-5(b), (f). When a charge is filed and the Commission determines, after investigation, that there is reasonable cause to believe that the charge is meritorious, it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. 2000e-5(b).[10] As this Court noted in *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 72 (1975):

> Congress chose to encourage voluntary compliance with Title VII by emphasizing conciliatory procedures before federal coercive powers could be invoked.

As a practical matter, once a dispute has reached the courts this policy of voluntary resolution can best be im-

[10]The Attorney General has authority under the statute to bring suits against state and local government employers. 42 U.S.C. (& Supp. II) 2000e-6. In such suits, it is particularly appropriate to seek a non-litigated resolution of the dispute in order to minimize the strain on federal-state relations. The decision below would, in some circumstances, force the United States to go to trial against a state or local government even though the latter is willing to comply with the law voluntarily.

plemented by encouraging settlement through consent decrees.[11] This mechanism—the consent decree—has proven to be an invaluable means of enforcing Title VII.[12] As the Fifth Circuit noted in *United States* v. *City of Jackson, Mississippi*, 519 F.2d 1147, 1151–1152 (1975) (footnotes omitted):

> It is a highly useful tool for government agencies, since it maximizes the effectiveness of limited law enforcement resources; by reaching agreement with private parties as to the specifics of substantial compliance, the government may avoid the risks as well as costs of full scale litigation of each point.

The court further observed (*id.* at 1152 n.9):

> Because of the consensual nature of the decree, voluntary compliance is rendered more likely, and the government may have expeditious access to the court for appropriate sanctions if compliance is not forthcoming. At the same time, the private parties involved also minimize costly litigation and adverse publicity and avoid the collateral effects of adjudicated guilt.[13]

---

[11] Although it is theoretically possible for the plaintiff to dismiss and settle out-of-court, the only way to secure injunctive relief enforceable by a contempt proceeding in the district court is to obtain that court's approval of the settlement agreement. It accordingly is the policy of both the EEOC and the Department of Justice to settle litigation by consent decree rather than by out-of-court agreement.

[12] Department of Justice records indicate that from 1966 to the present, the Department filed 193 suits under Sections 706 and 707 of Title VII, 42 U.S.C. 2000e-5 and 2000e-6. Of that number, 96 (49.7%) were settled by consent decree prior to trial. The Equal Employment Opportunity Commission has had similar experience. Its records show that between 1972 and 1979, the EEOC resolved approximately 1,021 of the 1,500 suits it filed under Section 706 and obtained 708 settlements before trial (69.3%), the overwhelming majority of which were by consent decree. In addition, the EEOC obtained consent decrees in all five Section 707 suits originally brought by the Department of Justice and transferred to the Commission pursuant to the 1972 amendments to Title VII, and has settled by consent 10 of the 15 Section 707 suits it has filed.

[13] Most of these benefits are equally applicable to private plaintiffs. Moreover, although respondents in the instant case now seek to re-

In sum, the decision of the court of appeals that appellate review of a district court's refusal to enter a consent decree is not available until after the case has been tried and a final judgment entered deprives the parties of this preferred mode of resolving Title VII disputes, contrary to the expressed will of Congress.

II. THE DISTRICT COURT'S ORDER IS APPEALABLE AS A "COLLATERAL ORDER" UNDER 28 U.S.C. 1291

In addition to its appealability under Section 1292(a)(1), the district court's order comes within a judicially recognized exception to the final judgment rule as an order that "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978) (footnote omitted). For the reasons set out above (see pages 10–12, *supra*), the order appealed from meets the first and third elements of that standard. Therefore, the sole remaining question is whether it presents an issue completely separate from the merits.

At the outset, a distinction should be drawn between the merits of a proposed settlement and the merits of the claims it seeks to compromise. The question a district court must face in evaluating a settlement is not whether the parties would have prevailed to the same extent and in the same respects had a trial produced factual findings identical to those stipulated to by the parties, nor whether

---

pudiate the settlement (see note 14, *infra*), typically the value of the consent decree to the *defendant* is so great that the defendant will continue to support the decree on appeal after the district court has refused to enter it. See *United States* v. *City of Alexandria*, *supra*, 614 F.2d at 1360–1361. Cf. *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193 (1979). Indeed, respondents herein supported the proposed consent decree in the court of appeals and did not attempt to repudiate it until after the court had dismissed the appeal. Thus, denial of the right to appeal disadvantages parties on both sides of the bargain.

the facts adduced at trial would have mirrored those on which the parties agreed for purposes of settlement. As the Second Circuit said in *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 456 (1974), "[i]t cannot be overemphasized that neither the trial court in approving [a] settlement nor [appellate courts] in reviewing that approval have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute." Rather, the role of the courts is more limited: to assure that a proposed settlement is fair, adequate, reasonable and noncollusive. *City of Detroit* v. *Grinnell Corp.*, *supra*; *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.), cert. denied, 419 U.S. 900 (1974); *Flinn* v. *FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976); *Cotton* v. *Hinton*, 559 F.2d 1326 (5th Cir. 1977); *Patterson* v. *Stovall*, 528 F.2d 108 (7th Cir. 1976); *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 864 (1975); *Mandujano* v. *Basic Vegetable Products, Inc.*, 541 F.2d 832 (9th Cir. 1976).

Thus, the issue of whether a proposed settlement should be approved is quite distinct from the post-trial issue of who is entitled to prevail. As the Ninth Circuit observed in *Norman* v. *McKee*, 431 F.2d 769, 773 (1970), cert. denied, 401 U.S. 912 (1971):

> The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and it is not in any sense an ingredient of the cause of action. In itself, the district judge's order is final on the question of whether the proposed settlement should be given judicial approval.

And, as detailed in point I of this brief (see pages 11-12, *supra*), the benefits to the parties of settlement are irretrievable once a case goes to trial.

It follows that the district court's order in the instant case satisfies all three prongs of the collateral order exception to the final judgment rule. Moreover, as detailed ear-

lier in this brief (see pages 14–16, *supra*), the order's appealability would further rather than frustrate the policies underlying the rule of advancing the course of litigation and maximizing judicial resources,[14] and would promote the strong congressional policy favoring voluntary settlement of Title VII claims.

---

[14] Respondents contend (Br. in Opp. 6–10) that the questions presented in the petition have been rendered moot by respondents' withdrawal of consent to the entry of the decree. The reason given by respondents for withdrawing their consent is that the law governing the substantive provisions of the decree has been changed by intervening decisions of this Court (*id.* at 8–9). However, in our view the consent decree signed by the parties is a conditional contract (conditioned upon approval by the district court in the proper exercise of its discretion) from which neither party has a right of revocation before the condition is met. 3A A. Corbin, *Contracts* § 649 (1960). Had one of the parties wished to repudiate the agreement before the district court had an opportunity to act, it would not have been free to do so under the terms of the agreement, though it would have remained free to argue to the court that because of unforeseeable changed circumstances the decree should not be entered (just as a party on like grounds can seek modification of a decree). The same rule should apply on appeal. Otherwise, a party's right to take an appeal would be conditioned on the acquiescence of its adversary. Nothing in the proposed decree agreed to by the parties to this case requires that result.

Parties should, of course, remain free to limit and condition their assent to a settlement agreement as they see fit. Here the parties did not enter into a separate agreement, but instead submitted a joint proposed consent decree. Nevertheless, underlying every settlement agreement, written or implied, is the implicit expectation that in deciding whether to approve the settlement the district court will act nonarbitrarily and in conformity with the law.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

HARLON L. DALTON
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MARIE E. KLIMESZ
Attorneys

LEROY D. CLARK
General Counsel
Equal Employment
Opportunity Commission

AUGUST 1980

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 326451 55